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No. 623

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

EASTERN EXPRESS, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

JURISDICTIONAL STATEMENT

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December 22, 1961

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion (denominated Memorandum Entry) and Judgment of the United States District Court for the Southern District of Indiana, Terre Haute Division, were handed down on September 5, 1961, and are

set forth in Appendix A hereto. The opinion has not yet been reported in the Federal Supplement.

The initial report of the Interstate Commerce Commission, which prompted the filing of the cause below, is dated September 4, 1959, and is printed at 308 I.C.C. 455. It is set forth in Appendix B hereto. The order entered by the Commission and dated September 4, 1959, discontinuing the proceedings before it is set forth as Appendix C hereto.

The report on reconsideration in which the Interstate Commerce Commission affirmed its initial report is printed at 310 I.C.C. 199. It is set forth in Appendix D hereto.

JURISDICTION

The cause below was brought under 28 U.S.C. §§ 1335, 1398, 2284, and 2321 through 2325, to set aside and annul an order of the Interstate Commerce Commission approving certain freight forwarder volume commodity rates in connection with trailer-on-flatcar service. The decision and order of the three-judge District Court was entered on September 5, 1961, and notice of appeal was filed in that court by appellants here on October 24, 1961.

The jurisdiction of the Supreme Court to review this decision upon direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b) and is sustained by the following decisions: *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956); *American Trucking Associations* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958); *Minneapolis and St. L. R. Co.* v. *United States*, 361 U.S. 173 (1959); *Florida Lime and Avocado Growers* v. *Jacobson*, 362 U.S. 73 (1960); and *American Trucking Associations, Inc.*, et al. v. *United States* et al., 364 U.S. 1 (1960).

STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertinent to this proceeding are as follows:

National Transportation Policy
49 U.S.C. preceding §§ 1,
301, 901, and 1001

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

DEFINITION

Section 402(a)(5) of the Interstate Commerce Act [49 U.S.C. § 1002(a)(5)]

"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to

the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transporation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

LIMITATIONS

Section 410(a) of the Interstate Commerce Act [49 U.S.C. § 1010(a)]

"No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service; * * *"

Section 410(h) of the Interstate Commerce Act [49 U.S.C. § 1010(h)]

"Permits issued under this part shall not authorize the holder thereof to conduct any direct railroad, water, or motor-carrier operations, except motor-vehicle operations in transportation which, pursuant to the provisions of section 202 (c)(1) of this Act, is to be regulated as service subject to this part."

Section 202(c)(1) of the Interstate Commerce Act [49 U.S.C. § 302(c)(1)]

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part,

except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder; * * *"

Section 411(a)(1) of the Interstate Commerce Act [49 U.S.C. § 1011(a)(1)]

"It shall be unlawful for a freight forwarder, or any person controlling, controlled by, or under common control with a freight forwarder, to acquire control of a carrier subject to Part I, II, or III of this Act; * * *"

Section 418 of the Interstate Commerce Act [49 U.S.C. § 1018]

"It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; express companies subject to this Act; air carriers subject to the Civil Aeronautics Act of 1938, as amended; common carriers by motor vehicle engaged in transportation exempted under

the provisions of section 203(b)(7a) of this Act; common carriers by motor vehicle exempted under the provisions of section 204(a)(4a) of this Act; or common carriers by water engaged in transporation exempted under the provisions of section 303(b) of this Act."

Section 8(b) of the Administrative Procedure Act [5 U.S.C. § 1007(b)]

"Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

QUESTIONS PRESENTED

1. Inasmuch as Section 402(a)(5) of the Interstate Commerce Act requires a freight forwarder to assemble and consolidate the individual shipments of freight it accepts for transportation, to forward the consolidated lot to a break-bulk point from which the separate individual shipments are to be distributed, and inasmuch as Section 418 of the same Act prohibits the utilization by the forwarders of the facilities and

services of any carriers other than common carriers by rail, highway, and water, in the transporation of the consolidated lot, did the Interstate Commerce Commission and the court below erroneously interpret the Interstate Commerce Act and particularly the aforesaid sections thereof by holding that freight forwarders may lawfully provide highway trailers for individual trailerload shipments, tender said trailers in groups of two to the railroads for transportation on railroad flatcars, and deliver said individual trailerload shipments at destination?

2. Inasmuch as transportation by motor carriers in interstate commerce may be performed only upon authorization by the Interstate Commerce Commission after a finding that such service is required by the public convenience and necessity,[1] did the holding by the Commission and the court below authorizing forwarders virtually to duplicate motor carrier trailerload transportation violate the carefully devised Congressional plan for the regulation of interstate transportation?

3. Did the Interstate Commerce Commission and the court below erroneously conclude that it was unimportant and therefore unnecessary to rule upon each of the several findings requested by appellants to the effect that the considered forwarder service would be the substantial equivalent of certain railroad and motor-carrier services; that the admitted purpose of the forwarders is to engage, for the first time, in competition with the motor carriers for trailer load traffic; that the proposed forwarder service would be performed only between points of substantial traffic im-

[1] See Sections 206 and 207 of the Interstate Commerce Act (49 U.S.C. §§ 306 and 307).

portance; that the proposed forwarder service would jeopardize the ability of motor carriers to continue to provide transportation between both large and small communities at rates which avoid undue discriminations; and that the proposed forwarder service utilizing railroad trailer-on-flatcar service would permit collaboration between the railroads and the forwarders to destroy the motor carriers?

STATEMENT OF THE CASE

As the Commission observed in *Movement of Highway Trailers By Rail*, 293 I.C.C. 93 (1954), there was, during the year 1953, a resurgence of interest in trailer-on-flatcar operations by the railroads. As a result of that interest there was established between several pairs of points an operation whereby the laden highway trailers of motor carriers would be transported by the railroads on flatcars from area of origin to area of destination. This coordinated joint-line service of the motor carriers and the railroads became known as Plan I TOFC service.

At substantially the same time the railroads also established what became known as Plan II TOFC service in which door-to-door transportation was provided in its entirety by the railroads.

The rates and charges for transportation Plan II TOFC service were established on substantially the same basis and were generally the same as those assessed by the motor carriers for over-the-highway transportation or transportation using Plan I TOFC service. Such rates and charges are fixed by reference to the description of the freight transported as well as to the weight of the shipment.

In July, 1958, by tariffs duly filed and permitted by the Commission to become effective, several rail-

roads established a new type of trailer-on-flatcar service between certain points of heavy traffic volume. In such service they transport, for charges which do not vary with the character of the freight and which are much lower than those for motor carrier and Plan II services, a maximum of 70,000 pounds of cargo loaded into not to exceed two highway trailers supplied by the shipper. Said cargo must consist of at least two commodities neither of which shall weigh more than 60 percent of the total.[2]

Freight forwarders are, by definition, carriers which effect the transportation of the goods they undertake to carry by utilizing the services and facilities of carriers subject to parts I, II, or III of the Interstate Commerce Act.[3] As such, forwarders are indirect and non-physical transporters of freight. They may properly be characterized as adjunctive carriers.[4]

Upon the aforesaid railroad tariffs becoming effective, the freight forwarders published rates of general application specifically limited to shipments of truckload or so-called volume sizes. The avowed purpose of the forwarders was, for the first time, to become competitive with the motor carriers for such traffic. In such operations, however, the forwarders claimed the right to accept such shipments for transporation in

[2] Appellants have assailed these services both before the Interstate Commerce Commission and before the United States District Court for the Western District of Missouri, in *Cooper-Jarrett, et al.* v. *United States, et al.*, Civil Action No. 13469, presently pending before that court.

[3] Section 402(a)(5) of Interstate Commerce Act, 49 U.S.C. § 1002(a)(5).

[4] See dissenting opinion of Commissioner Walrath in Appendix D hereto, page 45a.

trailers of which the forwarder was the owner or lessee, to operate such loaded trailers in their own names over the public highways and streets of the terminal area of the city of origin, to tender such loaded trailers to the railroad in groups of two at the railroad yard in the city of origin, to accept said trailers at the railroad yard in the city of destination, and to operate said trailers within the terminal area and there to make delivery of the shipments so transported by and in said trailers.

The Interstate Commerce Commission concluded that in the foregoing type of freight forwarder operation the forwarders will, in the ordinary and usual course of their undertaking, perform the services of assembly, break-bulk, consolidation, and distribution as contemplated by Section 402(a)(5) of the Interstate Commerce Act. Moreover, said the Commission, the provisions of Section 418 of the Interstate Commerce Act were intended only to prohibit use by forwarders of the line-haul services of contract carriers by motor vehicle, and not to prohibit the provision by the forwarders of their own line-haul equipment if, indeed, forwarder-provided highway trailers are not mere containers, as the Commission viewed them to be.

After issuance by the Commission of its report holding substantially as summarized above, these appellants filed their complaint in the court below. Thereupon the Commission reopened its proceeding for reconsideration on the record before it. These appellants then filed with the Commission a petition seeking answers to twelve questions of paramount significance to the legality of the practices at issue. In its report on reconsideration the Commission acknowledged re-

ceipt of appellants' petition but avoided making direct answers to the questions by stating that to the extent those questions were important to the issues presented, the answers thereto would be found in one or the other of the two reports. There were no answers to some of the questions.

By the Memorandum Entry attached hereto as Appendix A, the court below sustained the order of the Interstate Commerce Commission but gave no reason other than those already given by the Commission which, apparently, the court adopted.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This appeal presents questions which are of tremendous importance to the transportation industry, and hence to the nation. The resolution of these questions, as indicated by the dissenting opinion of Commissioner Walrath and the separately concurring opinion of Commissioner Freas,[5] may well shape the economic life of this nation for years to come.

Included in the issues is whether or not the Interstate Commerce Commission may approve as lawful an admittedly new type of freight forwarder operation solely because it is not specifically described and prohibited by the Interstate Commerce Act. This question takes on even greater importance when it is observed that the Commission has virtually disregarded requests for findings of fact which, if made, would have provided a basis for applying the criteria of the National Transportation Policy to the new type of forwarder operation and to its relationship to the functions and operations of the other modes of carriage.

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[5] Appendix D hereto, pages 42a and 43a.

Also included is the issue of whether freight forwarders are to be required to adhere to their original status as "users" of the physical facilities and the line-haul services of other carriers or, instead, are to be permitted to acquire and use in their operations facilities for line-haul transportation which are duplicative of facilities maintained and similarly used by railroads and motor carriers in their own line-haul operations.

Finally, there is also the issue of whether or not freight forwarders are to be permitted to become carriers of truckload or volume traffic upon a wide and comprehensive scale. The rates they have heretofore maintained upon such shipments have been peripheral rather than pervasive and both the courts and the Commission have recognized them as specialists in the transportation of small shipments. Thus, even prior to Commission regulation of freight forwarders, the Supreme Court in *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344, 345-346 (1940), characterized the service of the freight forwarders in the following language:

> "Forwarders utilize common carriers by rail and motor truck to transport goods owned by others. They solicit and obtain many small shipments, from various points within an area, and cause them to be carried in less than truckload or carload lots to a concentration center within the area. There they are assembled by the forwarder for further transportation in truck-load or carload lots. Although the forwarder gives owners of individual small shipments his own contract corresponding in form to through bills of lading and assumes responsibility for safe through carriage, the forwarder customarily arranges for the pickup, assembly and transportation of the shipments by carriers for hire. And the forwarders,

not the owners of the goods, select the carriers and route the shipments. Upon arrival of a truck-load or carload of the assembled small shipments at a distribution center, the bulk shipment is broken up, the forwarder separates and takes possession of the original small shipments and arranges, where necessary, their further carriage to their various final destinations in the area served by the particular distribution point. In this final carriage of the small shipment to its ultimate destination, the forwarder again utilizes carriers for hire to move these less than truck-load or carload lots. Thus, forwarders may use the service of carriers to assemble shipments of less than truck-load or carload lots at their concentration center, to transport the assembled truck-load or carloads to a distribution center and to carry the broken up small shipments beyond their break-bulk distribution center.

"The forwarding business has been built upon the expectation that a material part of the transporation which it causes to be provided for small shippers can by consolidation of small shipments be obtained at truck-load or carload rates. For the forwarders' business was originally made profitable because it could operate upon the margin of profit represented by the difference between railroad carload rates paid by the forwarder and the higher rates, approximating less than carload rates, which the forwarder charged the owner of a shipment. * * *"

In *Bernstein Service, Freight Forwarder Application,* 260 I.C.C. 498, 499 (1945), the Interstate Commerce Commission disposed of an application to continue service as a freight forwarder of general commodities, in the course of which it said:

"* * * The ordinary and usual service of a freight forwarder is to accept for shipment from the gen-

eral public numerous small shipments, and to collect from the shippers transportation charges based on rates which are higher than the carload or truckload rates of the common carriers whose services are utilized to perform the actual transportation. Such rates generally approximate the less-than-carload or less-than-truckload rates of the carriers. The margin of difference between the charge the forwarder collects from the shipper and the charge which the forwarder must pay to the common carrier reflects the amount the forwarder secures for its service. While the record in the instant proceeding does not reveal how applicant obtains its revenue, it is apparent that shippers would not offer truckload shipments on the basis of less-than-truckload rates. Applicant's revenue on such shipments therefore, must be obtained either from the shippers by means of a service charge, or from the carriers by means of a brokerage or solicitation fee. In either event, the service of applicant would not be that of a freight forwarder as contemplated by part IV of the act. * * *"

The Commission's use of the phrase "ordinary and usual" in the foregoing context takes on added significance when it is remembered that the statutory definition of a forwarder in Section 402(a)(5), at that time only recently added to the Interstate Commerce Act, is couched in terms of what the forwarder does "in the ordinary and usual course of its undertaking."

Some seven years after the statutory definition of a freight forwarder, the Supreme Court had another occasion for reiterating what it had said in the *Chicago Heights* case, supra. In *Chicago, M. St. P. & Pac. R. Co.* v. *Acme Fast Freight*, 336 U.S. 465 (1949), the Supreme Court said at page 467 of its opinion:

> "Freight forwarders consolidate less than carload freight into carloads for shipment by rail, truck, or water. Their charges approximate rail less than carload rates; their expenses and profits are derived from the spread between the carload and l. c. l. rates. Forwarders are utilized by l. c. l. shippers because of the speed and efficiency with which they handle shipments, the unity of responsibility obtained, and certain services which forwarders make available."

The permits issued by the Interstate Commerce Commission authorizing either the continuance or the establishment of freight forwarder service have, in the main, been couched in terms of broad territorial grant. Thus, at least four freight forwarders have received permits authorizing the forwarding of commodities generally between all points in the United States.[6] *No motor carrier of general commodities has ever received so wide an authorization from the Commission.* Neither would the operating authorities of literally scores of such carriers, taken as an aggregate, embrace all points in the nation. But because of the nature of their operation, forwarders were granted wide territories, sometimes upon proof only of past sporadic operations.[7] The Commission has itself held that the public need not be protected against excessive competition between and among freight forwarders. In *Lifschultz Fast Freight Extension—West and Midwest*, 265 I.C.C. 431, 441 (1948), the Commission said:

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[6] See permits granted in *Acme Fast Freight, Inc., Freight Forwarder Application*, 250 I.C.C. 747 (1943); *International Forwarding Co. F. F. Application*, 260 I.C.C. 249 (1944); *National Carloading Corp. F. F. Application*, 260 I.C.C. 47 (1943); and *Universal Carloading & Distributing Co., Inc.*, F. F. Applic., 260 I.C.C. 33 (1943).

[7] *Acme Fast Freight, Inc., Freight Forwarder Application*, 250 I.C.C. 747 (1943).

> "One of the basic reasons why rail, motor, and water carriers are required to obtain authority from this Commission as a prequisite to operation is to protect the public from the effects of improvident investments in transportation facilities. Forwarders, however, do not customarily invest any substantial amounts of capital in physical property or facilities, but, for the most part, make use of such properties and facilities as may be provided by the underlying carriers, which actually perform the transportation. As observed by Congressman Wolverton, 'The public, therefore, needs no protection against improvident investments by the forwarder in transportation property, facilities, and equipment.' 87 Cong. Rec. 8219. See also his remarks following the conference on the bill. 88 Cong. Rec. 4067."

As seen, the Commission has now interpreted the Interstate Commerce Act as permitting freight forwarders to acquire and utilize highway trailers for line-haul transportation. Thereby the Commission has at a single stroke destroyed the principal protection of the public against over-development of the transportation plant.

Moreover, the Commission has also permitted the forwarders to compete for the first time on a broad and comprehensive scale with the physical carriers for volume and trailerload traffic as to which traffic the forwarder functions of consolidation and break-bulk are not performed. Thus the fundametal importance of the questions here presented is brought into sharp focus. *Transportation of truckload or volume traffic by freight forwarders has no advantage that is not inherent in its transportation by the physical carriers.* The diversion of such traffic from the physical carriers will curtail their revenues and hence undermine their

financial position and thereby impair their ability to discharge their statutory duty to render adequate and efficient service to the public.

The significance of the foregoing lies in the fact that the National Transportation Policy expressly requires the recognition and preservation of the inherent advantages of the several modes of transportation. The decision of the Commission, as sustained by the court below, takes away from the physical carriers their inherent advantage and gives it to the freight forwarders to exploit, not for the public, but for their private benefit.

CONCLUSION

The questions presented by this appeal are substantial and are of sufficient public importance to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

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Attorneys for Appellants

December 22, 1961

Certificate of Service

I, Homer S. Carpenter, one of the attorneys for Eastern Express, Inc.; The Eastern Central Motor Carriers Association, Inc.; the National Motor Freight Traffic Association, Inc.; and the Regular Common Carrier Conference of the American Trucking Associations, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of December, 1961, I served copies of the foregoing Jurisdictional Statement on the several parties as follows:

1. On the United States, by mailing copies, duly addressed and postage prepaid, to Hon. Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C.; to Lee Loevinger, Assistant Attorney General, Department of Justice, Washington 25, D. C.; to Richard H. Stern, Attorney, Department of Justice, Washington 25, D. C.; and, airmail postage prepaid, to Richard P. Stein, United States Attorney, 246 Federal Building, Indianapolis 4, Indiana.

2. On the Interstate Commerce Commission, by delivering a copy to Robert W. Ginnane, its General Counsel, and by delivering a copy to B. Franklin Taylor, Jr., its Associate General Counsel, at their offices in Washington, D. C.

3. On the intervening defendants, ABC Freight Forwarding Corporation; Acme Fast Freight, Inc.; Blue Ribbon Express, Inc.; Clipper Carloading Company, Inc.; Freight Forwarders Institute; International Forwarding Company, Inc.; Sidney B. Lifschultz, Bernice Brown, Rose Grossman, Nora Bergman and American National Bank and Trust Co. of Chicago, Trustee, a partnership, d/b/a Lifschultz Fast Freight; Midland Forwarding Corporation; National Carloading Corporation; Pacific and Atlantic Shippers, Inc.; Republic Carloading & Distributing Company, Inc.; Springmeier Shipping Company, Inc., and Universal Carloading & Distributing Company, Inc., by mailing copies in duly addressed envelopes with first-

class or airmail postage prepaid as appropriate, to their attorneys as follows:

To Kenneth F. Burgess, Esq., and
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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUT DIVISION

No. TH 59-C-50

EASTERN EXPRESS, INC., *et al.*,

v.

UNITED STATES OF AMERICA, *et al.*

Memorandum Entry

This is an action to set aside and annul an order of the Interstate Commerce Commission approving certain freight forwarder volume commodity rates in connection with trailer-on-flatcar service.[1] The action was brought pursuant to 28 U.S.C. §§ 1336, 1398 and 2321 through 2325. The United States of America was made a party as required by Section 2322. The court's jurisdiction of the parties and the subject matter is not in issue. A three-judge court was convened pursuant to 28 U.S.C. § 2284, and the case was submitted upon the pleadings and a certified copy of the record of the proceedings before the Interstate Commerce Commission, including the evidence therein. Exhaustive briefs were filed, and the court has had the benefit of oral arguments of counsel.

For brevity, hereinafter the Interstate Commerce Commission will be referred to as "the Commission."

Plaintiffs were protestants before the Commission. Plaintiff Eastern Motor Express, Inc. is an Indiana cor-

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[1] The initial report and order of the Commission is dated September 4, 1959, and was entered in Investigation and Suspension Docket 6993, which includes Supplemental Orders Nos. 1-7, *Forwarders Volume Commodity Rates Between Chicago and New York*, 308 I.C.C. 455; and its report on reconsideration is dated April 8, 1960, in Docket No. 32530, *Forwarder Volume Commodity Rates Between Chicago and New York*, 310 I.C.C. 199.

poration with its principal office in Terre Haute, Indiana. It is a common carrier by motor of general commodities in interstate and foreign commerce from New York City, New York, and other eastern cities to Chicago, Illinois, and St. Louis, Missouri, serving all intermediate points on most of its routes. Plaintiff The Eastern Central Motor Carriers Association, Inc. is an Ohio corporation, the membership of which is comprised of common carriers by motor which provide transportation of property in interstate commerce between eastern points, including Chicago and St. Louis. Plaintiff The National Motor Freight Traffic Association, Incorporated is a membership corporation of the District of Columbia, its members being common carriers by motor which are in competition for traffic with the freight forwarders whose operations and rates are the subject of the report and order of the Commission in this proceeding. Plaintiff The Regular Common Carrier Conference of the American Trucking Association, Inc. is a District of Columbia corporation, the membership of which comprises common carriers by motor which perform transportation in interstate or foreign commerce over regular routes under the jurisdiction of the Commission.

By order of this court, the freight forwarders whose rates were approved by the Commission in the order which the plaintiffs seek to annul and the Freight Forwarders Institute, an association of freight forwarders, were permitted to intervene as defendants in this proceeding. The defendant freight forwarders are: A. B. C. Freight Forwarding Corporation; Acme Fast Freight, Inc; Blue Ribbon Express, Inc.; Clipper Carloading Company, Inc.; International Forwarding Company, Inc.; Sidney B. Lifschultz, Bernice Brown, Rose Grossman, Nora Bergman and American National Bank and Trust Co. of Chicago, Trustee, a partnership, d/b/a Lifschultz Fast Freight; Midland Forwarding Corporation; National Carloading Corporation; Pacific and Atlantic Shippers, Inc.; Republic

Carloading & Distributing Company, Inc.; Springmeier Shipping Company, Inc.; and Universal Carloading & Distributing Company, Inc. Each defendant freight forwarder is engaged in the transportation, or the providing of transportation, of property in interstate commerce subject to regulation by the Commission.

The four principal common carrier transportation agencies, namely, the railroads, motor carriers, water carriers, and freight forwarders, are regulated in separate parts of the Interstate Commerce Act. The freight forwarders are regulated under Part IV of the act, which was adopted in 1942 (49 U.S.C. §§ 1001, et seq.) "Freight forwarder" is defined in Section 402(a) of the Act, as amended, 49 U.S.C. § 1002(a), which reads:

> "(5) The term 'freight forwarder' means any person which (otherwise than as a carrier subject to Chapers 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to Chapters 1, 8, or 12 of this title."

In July, 1958, the railroads inaugurated a trailer-on-flatcar ("piggyback") service which requires the shipper to furnish the trailers and to transport them to and from the rail loading ramps. These rates, known, as Plan III,

to distinguish them from other types of "piggyback" service offered,[2] provide for the transportation of not more than two trailers on one flatcar, the trailers to be empty or loaded with not more than 70,000 pounds of freight, no one commodity to exceed sixty per cent of the total carload weight.

By tariff schedules filed with the Commission to become effective on August 20, 1958, and later dates, the defendant freight forwarders published a number of volume rates for the transportation of specified commodities between Chicago and the New York City area in shipments of the respective minimum weights specified in the tariffs, ranging from 10,000 to 30,000 pounds. The proposed rates were published on the same level as the corresponding rates for similar shipments between Chicago and New York maintained by the principal motor common carriers. Under the proposed rates, a shipper desiring to ship between Chicago and New York by freight forwarder a shipment of one of the specified commodities at the weight of 10,000 to 30,000 pounds specified in the tariff item would be enabled to do so at the same rate as that available to

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[2] Under Plan I TOFC service, the railroads provide motor carriers, in substitution for highway movement, flatcar transportation of their freight-laden trailers. The traffic moving in this service moves on motor carrier billing and at motor carrier published rates.

Plan II TOFC service is offered by the railroads directly to the shipping public and consists of transportation from the shipper's premises to the receiver's premises in highway trailers provided by the railroads, the movement between the railroads' terminals being accomplished on railroad flatcars.

Plan III TOFC service is offered directly to the shipping public but is restricted to the movement on railroad flatcars of traffic in shipper-provided trailers. It differs from Plan II in that the railroads provide neither the trailers nor their movement beyond their terminals.

Plan IV TOFC service is the same as Plan III service except that the shipper provides both the trailers and the flatcars.

him by motor carrier, such rate being lower per hundred pounds than the rate for smaller shipments.

Upon protest of the plaintiff motor carrier associations, plaintiff Eastern Express, Inc., and certain other motor common carriers operating within official territory,[3] the proposed forwarder rates reviewed by the Commission in its Investigation and Suspension Docket No. 6993, and supplements, were suspended until March 20, 1959, and later dates, when they became effective. Similar volume commodity rates of defendant International Forwarding Company, Inc. between Chicago and New York were not suspended and became effective prior to September 19, 1958, but were included in the Commission's investigation by order of the Commission on September 19, 1958, in Docket No. 32530.

Hearings were held before an examiner of the Commission, at which testimony and exhibits were received in evidence. An examiner's report was waived by the parties, briefs were submitted, and oral argument was heard by the entire Commission. On September 4, 1959, the Commission made and filed its report containing its findings and conclusions and entered its order,[4] in which report and order the Commission, among other things, made the ultimate finding that the rates in question are just and reasonable and not otherwise unlawful, and discontinued the proceedings. After the plaintiffs filed their complaint in this court, the Commission, on its own motion, reopened the proceedings for reconsideration on the rec-

[3] Official territory consists generally of that part of the United States lying east of the Mississippi River and north of the Ohio River and a line drawn roughly from Cincinnati, Ohio, to Norfolk, Virginia; hence it includes the territory between Chicago and New York involved here. See *New York* v. *United States*, 331 U.S. 284, 291 (1947); *Class Rate Investigation*, 1939, 262 I.C.C. 447, 457, 516 (1945).

[4] Footnote 1, *supra*.

ord, and this court stayed the present action pending final administrative action on the reopening. On April 8, 1960, the Commission made and filed its report on reconsideration[5] in which it made certain additional findings, adhered to the views which it had expressed in the prior report, and affirmed the findings therein.

Plaintiffs state there is not before the court an issue involving administrative expertise; that the issues before the court are those which are familiar to judges—a question of statutory construction, and whether the administrative agency failed to perform the statutory obligation placed upon it by the statute. On the other hand, the defendants state that the general issue before the court is simply whether the Commission's conclusion that the rates at issue are just and reasonable, and not otherwise unlawful, is supported by adequate findings and is in accordance with statutory standards. In support, they say the rates in question are peculiarly for the decision of the Commission as the expert in the field; that the Commission, as the rate making body, is charged with determining the justness and reasonableness of rates and tariffs for interstate shipments under the Act, and if the conclusion of the Commission is in accordance with law, is not arbitrary, or an abuse of discretion, and is supported by adequate findings which reveal that the decision has a rational basis, and not against the public interest, then the decision may not be disturbed on review. We agree this is a general statement of the rule. As we understand our function, we are not permitted to prescribe or approve rates, nor are we at liberty to prescribe general attitudes the Commission must adopt towards the exercise of its discretion left to it rather than to the courts. We are to decide only whether the Commission has acted within the power delegated to it by law. *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 691 (1942).

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[5] Footnote 1, *supra*.

Though there are many subsidiary aspects of plaintiffs' argument, they fall generally under three principal headings. Plaintiffs contend the rates in issue are unlawful for the following reasons:

First, the assailed service the forwarders are enabled to render under the Commission's order is such that it goes far beyond the scope of lawful freight forwarder operation. They claim forwarder operations authorized by statute embrace only less-truckload or less-carload shipments, and that lawful forwarder operations require numerous services which will not be rendered in the course of the "new," "alien" forwarder activity.

Second, plaintiffs state the freight forwarder service made possible through their volume rates, and under Plan ET of the rail carriers, will be in derogation of Section 418 of the Interstate Commerce Act, which prohibits forwarders from supplying "instrumentalities" of transportation, except as permitted in that section, 49 U.S.C. § 1018.[6]

And third, they say the Commission's order approving the volume commodity forwarder rates permits the entry of the forwarders into the field of truckload and volume transporation which will impair the abilities of the motor

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[6] Section 418 provides:

"It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; express companies subject to this Act; air carriers subject to the Civil Aeronautics Act of 1938, as amended; common carriers by motor vehicle engaged in transportatoin exempted under the provisions of section 203(b)(7a) of this Act; common carriers by motor vehicle exempted under the provisions of section 204(a)(4a) of this Act; or common carriers by water engaged in transportation exempted under the provisions of section 303(b) of this Act."

carriers to continue their services to the large and small points at equivalent rates without discrimination or prejudice, and that this would be destructive of the national transportation system by rail, highway, and water. Under this latter contention, plaintiffs also assert that the full reach of the Interstate Commerce Act requires that the separate modes of transportation be kept separate, and that the volume commodity shipments by the forwarders will deprive the public of inherent advantages of separate modes of transport.

Counsel for the United States, and counsel for the Commission, counter by stating that the freight forwarder service offered under the challenged rates is well within the statutory area of forwarder activity, in that the volume basis of the challenged rates is no bar to their legality, and the service rendered under the challenged rates is true forwarder activity; that the Commission did not err in concluding that Section 418 does not prohibit the freight forwarder from rendering the service contemplated by the rates at issue, since the purpose of Section 418 is simply to require freight forwarders to use specified regulated and exempt common carriers, rather than contract carriers, for the performance of line-haul transportation, and that since the line-haul transportation is performed by the railroads, there is no violation of Section 418. And finally, they state that the Commission gave due and proper consideration to the relevant provisions of the national transportation policy in concluding that the rates in issue are just and reasonable.

The argument of the defendant freight forwarders is similar to that of the United States and the Commission. They say the Commission properly found that the handling of forwarder shipments in the 10,000 to 30,000 pound minima weight category and the publication of rates thereon are lawful; that the Commission properly found that under these rates the forwarders would perform the serv-

ices contemplated in the statutory definition of freight forwarders; that the Commission properly found that the assailed service does not violate Section 418; and that the Commission correctly found that the rates at issue are proper under the national transportation policy, and that to deny forwarders their right to compete fairly with the motor carriers would be contrary to that policy.

With these arguments before us, we have examined the reports of the Commission and the record of evidence in these proceedings.

The Commission's reports contain statements of findings and conclusions in support of its ultimate finding. The Commission found that in recent years the freight forwarders operating in official territory generally have maintained rates the same as those of the principal motor common carriers on shipments weighing less than 10,000 pounds; that, apart from the rates in question, the freight forwarders have published rates on some commodities subject to weights exceeding 10,000 pounds on a lower basis than those applicable on smaller shipments; that this has not been true generally, because the spread between the freight forwarder rates and the rail carload rates used by the forwarders for rail movement of consolidated forwarder shipments was insufficient to permit the establishment by the forwarders of lower rates on a profitable basis; that in July 1958, some rail carriers established trailer-on-flatcar ("piggyback") rates between Chicago and the New York City area of $451.50 which require the shipper to furnish the trailers and to transport them to and from the rail loading and unloading ramps; that these rates under Plan III TOFC, provide for the transportation of not more than two trailers on one flatcar, empty, or loaded with not more than 70,000 pounds of freight, with no one article to exceed a specified percentage of the total weight of the shipment, usually 60 per cent, and that if the weight of the lading exceeds 70,000 pounds, the excess weight is

subject to a rate of 64.5 cents per hundred pounds; that after these rail rates were established, the forwarders, concluding that they could establish lower rates on volume shipments on a profitable basis, published the volume rates at issue with the avowed purpose of meeting motor-carrier competition.

The Commission further found that the forwarders generally maintain lower rates on shipments weighing 5,000 pounds than on shipments of lesser weights, thereby giving effect to the lower cost for handling one large shipment as compared with several small shipments of the same aggregate weight, and that the plaintiffs do not object to this, although the plaintiffs urge that no weight break other than at 5,000 pounds should be permitted to the forwarders; the Commission also found and concluded that there is nothing in the provisions of Part IV of the Interstate Commerce Act, or the legislative history of those provisions which establishes that freight forwarders are, or were intended to be, limited in the weight of shipments which they may handle or which prohibits forwarders from establishing rates subject to minima ranging from 10,000 to 30,000 pounds; that the Commission in earlier decisions had approved freight forwarder rates at various volume minimum weights in excess of 10,000 pounds; that it is just and reasonable that the shipping public should receive the benefits flowing from any ability of a forwarder to handle a heavier shipment more economically than it can handle several small shipments of the same aggregate weight; and that in the absence of an applicable statutory limitation or prohibition, there is no justification for holding that freight forwarders may not publish lower rates on heavier weighted shipments based upon economies inherent in the lower costs to them of the underlying transportation service which they utilize.

The Commission found that under the forwarder rates at issue the forwarders generally would pick up a shipment,

either in a pick-up truck or in a trailer used in line-haul service, and bring it to their terminals, where it would be held awaiting consolidation with a sufficient quantity of other shipments so as to constitute the necessary trailer-loads, or would load into a line-haul trailer containing a shipment other freight picked up at a shipper's place of business en route between the forwarder's terminal and the railhead; that when two trailers were loaded they would be moved to the rail ramp and the rail carrier would place them on a flatcar; that occasionally one of the trailers may be loaded with only one shipment from one consignor to one consignee; that in order to comply with the provisions of the rail Plan III tariffs at least two different commodities must be loaded on each flatcar; that although there is no evidence that the forwarders have done so in the past, it is possible under the Plan III rail rates for a flatcar to be loaded with two trailers each containing but a single shipment; and that where a forwarder contracts for two or more shipments (including the case of two shipments each occupying a single trailer), tenders them at the railhead to be shipped as a single carload shipment, and makes, or arranges for, distribution of each of the tendered shipments to its consignee, there is consolidation and distribution by the forwarder despite the fact that the railroad which provides the underlying transportation physically places the trailers on the flatcar and removes them from the flatcar at the termination of the line haul. The Commission concluded that in the ordinary and usual course of their business, the forwarders will perform the services contemplated by Section 402(á) of the Interstate Commerce Act, 49 U.S.C. Section 1002(a).

Rejecting the contention of the plantiffs that Section 418 of the Interstate Commerce Act, 49 U.S.C. Section 1018,[7] prohibits the forwarders from providing the trailers which the rail carriers hold themselves out to transport under the

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[7] Footnote 6, *supra*.

rail Plan III rates, the Commission found that under the railroads' Plan III rates utilized by the forwarders for the line-haul transportation, there is no holding out by the railroads to furnish the trailers, and the rail rates apply on empty as well as loaded trailers; that the trailers are to be regarded as containers or articles of commerce rather than as instrumentalities of transportation; that in their relation with rail carriers forwarders are in most respects shippers, and, like ordinary shippers, they may furnish trailers under the rail Plan III rates; and that the purpose of Section 418 is to prevent forwarders from utilizing contract carriers for line-haul transportation.

After reciting the pertinent provisions of the national transportation policy (49 U.S.C. preceding Sections 1, 301, 901 and 1001) and pointing out that this declaration of policy does not mean that one transportation agency may be required to refrain from establishing rates which are just and reasonable and otherwise lawful in order to protect the traffic of a competing mode, the Commission found that since the rates at issue are in no instance lower than the corresponding rates of the motor carrier protestants, any advantage which one agency of transportation may have over the other is the result of differences in service; that the evidence does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to survive and serve the public; that the forwarder rates are compensatory and are no lower than necessary to meet the existing competition; and that to refuse to permit the forwarders to maintain rates on the same level as those of the motor carriers would be tantamount to an attempt by the Commission to apportion traffic artificially and thereby to prevent normal, healthy competition and deny forwarders an opportunity to compete fairly with motor carriers, contrary to the national transportation policy.

Plaintiffs' statements to this court on brief that the forwarders had not heretofore published rates applicable to volume shipments is contrary not only to the findings of the Commission but also to the evidence of both parties at the hearing before the Commission. Exhibit 20, offered by plaintiffs, consisted of fourteen pages setting forth existing volume rates of the defendant forwarders, prior to the rates here under consideration, which were applicable to shipments having minimum weights of 10,000 to 30,000 pounds between the points involved in this proceeding. The commodities covered by those pre-existing volume rates consisted of various kinds of freight, namely, bicycles NOI; bicycle parts, iron or steel; boots or shoes; floor coverings; freight, all kinds; pads or padding; traffic materials; radio receiving sets and television receiving sets, and related articles; electric razors; and soap ingredients. The tariff (Exhibit 4) filed with the Commission by one of the defendant forwarders in 1943, just after Part IV of the Interstate Commerce Act went into effect, published volume rates between Chicago and New York and other eastern points at progressively lower levels for higher minimum weights ranging up to a minimum weight of 20,000 pounds. Those volume rates remained in effect until 1947 when they were cancelled because the forwarder's costs had gone up to such a point, due to rail increases, that the forwarder no longer could continue to publish those rates. Thereafter, that forwarder lost the majority of its volume business because the truck rates were lower than the forwarder rates. The evidence showed that the forwarder rates for transcontinental shipments have for many years included large numbers of volume rates, that the forwarder Tariff 8 series which applies westbound is entitled "Volume Commodity Rates," that both it and the forwarder eastbound transcontinental tariff contained many rates with minimum weights of 30,000 pounds or more, that thousands of volume rates for transcontinental application have been published by the forwarders, and that the forwarders for

many years have been handling large numbers of shipments under their transcontinental volume rates at the relatively high minimum weights.

The evidence before the Commission showed that the national annual volume of freight handled by Class I motor carriers increased from 83,576,122 tons in 1948 to 132,730,481 tons in 1956, the latest date of record, whereas the volume handled by freight forwarders in 1948 was only 4,074,984 tons and in 1956 only 4,598,349 tons (Exhibit 12); that the majority of the shipments, both of motor carriers and of freight forwarders, were substantially less than the 10,000 to 30,000 pound weights which are the minimum weights here involved, the average shipment handled in 1956 by motor carriers being 1,253 pounds and by freight forwarders being 361 pounds (Exhibit 7); that the annual average shipment handled by one defendant freight forwarder in the period 1943 through 1946, when the forwarder maintained the volume rates between New York and Chicago shown in Exhibit 4, ranged from 908 pounds to 1,142 pounds (Exhibit 6); and that despite the general parity of rates of motor carriers and freight forwarders for shipments weighing less than 10,000 pounds, the competition for shipments at equal rates has not prevented survival and growth of the motor carriers.

One additional matter should be mentioned. Plaintiffs' complain that they presented to the Commission on the record, certain questions which the Commission did not discuss or dispose of in its first report. They allege that the Commission's failure to do so was error under Section 8(b) of the Administrative Procedure Act, 5 U.S.C. § 107. Plaintiffs state that upon the re-opening of the proceeding, they again asked the Commission to rule specifically on those matters by filing a petition which restated them in twelve separate questions. They insist that five of the questions were not answered by the Commission either directly or by implication in either report.

In its second report dated April 8, 1960, the Commission gave attention to the petition wherein the questions were asked, and stated—"The contents of that petition have been given careful consideration, and to the extent that the questions propounded are important to the issues presented, the answers thereto will be found herein or in the prior report in these proceedings." Taking the reports together, we agree with the Commission that to the extent the questions propounded are important to the issues presented before the Commission, the answers are found in the two reports. The Commission made adequate subsidiary findings upon the material issues presented in the proceedings before it, and the ultimate findings which it was required to make are supported by substantial evidence. *Minneapolis and St. Paul R. Co.* v. *U. S.*, 361 U.S. 173, 192 (1959).

From the foregoing, we conclude as a matter of law, that the defendant freight forwarders are not restricted by the Interstate Commerce Act, including the national transportation policy, to the handling of so-called small shipments or to the handling of shipments weighing less than 10,000 pounds or any other particular weight; nor are they so restricted to the publication of rates at minimum weights less than the minimum weights specified in the forwarder tariffs here involved. Nothing in that act and policy requires that freight rates of freight forwarders to the shipping public for shipments of more than 10,000 pounds shall be higher than the freight rates of the competing motor carriers for such shipments, or that they shall be no lower per hundred pounds than freight forwarder rates for smaller shipments. Nothing in that Act and policy gives, or was intended to give, to the motor carriers a right to exclude freight forwarders from competition with motor carriers for shipments of 10,000 pounds or more; nor does that Act and policy provide that competition of freight forwarders for such shipments shall be restrained by requiring freight forwarders to

charge the public more for such shipments than is charged by motor carriers, or by requiring freight forwarders to charge for such shipments rates no lower per hundred pounds than the rates for smaller shipments. The legislative history of Part IV of the Interstate Commerce Act shows that Congress was well aware that freight forwarders handled shipments weighing in excess of 10,000 pounds,[8] and further shows that Congress refused to restrict competition by adopting proposed provisions of Part IV[9] which, if adopted, would have made it unlawful for freight forwarders to publish rates lower than the contemporaneous rates of common carriers by railroad or motor vehicle for a like kind and quantity of property between the same points.

Under their operations described in the reports of the Commission in connection with the handling of shipments to which these freight forwarder rates apply, the freight forwarders, in the ordinary and usual course of their undertaking, would perform all of the services contemplated by Section 402(a)(5) of the Interstate Commerce Act.

With respect to the plaintiffs' argument that the assailed forwarder service is in derogation of Section 418 of the Interstate Commerce Act, in view of the reasons stated in the Commission's initial report in these proceedings, which have been stated heretofore, we concur in the conclusion of the Commission that rail shipments by the freight forwarders of their trailers, loaded or empty, under the rail Plan III piggyback rates published by the

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[8] Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. Res. 146, 76th Cong., 3rd Sess., June, 1940, pp. 31, 175-176, 298, 302, 429.

[9] Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 3684—A Bill to Amend the Interstate Commerce Act, as Amended, to Provide for the Regulation of Freight Forwarders, 77th Cong., 1st Sess., March, 1941, pp. 3-4.

railroads and available for the use of the shipping public, are not unlawful under said section.

In reaching its conclusions in this matter, the Commission gave due and careful consideration to, and properly applied the provisions of, the national transportation policy, as well as the other provisions of the Interstate Commerce Act. The record before the Commission amply justifies its conclusion that "The evidence does not permit a finding that the forwarder rates under consideration will produce a diversion of traffic sufficient to imperil the abilities of the motor carriers to survive and serve the public"; and the Commission's conclusion that "to refuse to permit the forwarders to maintain rates on the same level as those of the protestants would be tantamount to an attempt by us to apportion traffic artificially, and thereby to prevent normal, healthy competition and deny forwarders an opportunity to compete fairly with motor carriers, contrary to the national transportation policy" is a rational, proper, and permissible judgment.

The decision of the Commission in this proceeding is consistent with its previous decisions. The Commission in previous decisions has approved the publication by freight forwarders of rates for volume shipments at various minimum weights over 10,000 pounds. *Consolidation of Shipments by Freight Forwarders*, 256 I.C.C. 305 (1943); *New England Motor Rate Bureau, Inc.* v. *Julius Bleich, doing business as New York-Philadelphia Dispatch*, 272 I.C.C. 133 (1948); *Prepared Flour from Los Angeles to Arizona*, 283 I.C.C. 92 (1951); *Barge Service Corporation Freight Forwarder Application*, 285 I.C.C. 249, 285 I.C.C. 309 (1953); *Freight Forwarder Commodity Rates Westbound Transcontinental*, 296 I.C.C. 445 (1955); *Acme Fast Freight, Inc.* v. *Western Freight Association*, 299 I.C.C. 315 (1956); *Iron and Steel from Monaca, Pa. to Southern Points*, 305 I.C.C. 110 (1958); *Forwarder Volume Commodity Rates, Transcontinental*, 306 I.C.C. 535 (1959); *Radios, Boots, Etc. from the East to Texas*, 306 I.C.C. 615

(1959). Prior to the enactment in 1942 of Part IV of the Interstate Commerce Act, the Commission approved rail rates for the transportation of trailers of freight forwarders and other shippers and considered such trailers to be containers or articles of commerce. *Vehicle Container Rates in Southwest*, 196 I.C.C. 127 (1933); *Trucks on Flat Cars between Chicago and Twin Cities*, 216 I.C.C. 435 (1936). In *New England Motor Rate Bureau, Inc.* v. *Julius Bleich, doing business as New York-Philadelphia Dispatch*, 272 I.C.C. 133 (1948), the Commission, over the objections of competing motor carriers, approved rates of a freight forwarder at minimum weights up to 30,000 pounds, under which the freight forwarder shipped its loaded trailers by rail to the point from which delivery of the shipment was made direct to the consignee. In *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954), the Commission approved the use by freight forwarders of rail rates for the transportation of loaded trailers of the freight forwarders. As stated by the Commission in its reports herein, the Commission has held that the national transportation policy "does not mean that one transportation agency may be required to refrain from establishing rates which are reasonable and otherwise lawful in order to protect the traffic of a competing mode. E.g., *Cigarboxes from Newark, N. J. to Selma, Ala.*, 296 I.C.C. 68; *Various Commodities,—Mid-Atlantic and New England*, 63 M.C.C. 584; see *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282." The Commission also has previously held that in ruling upon competitive transportation rates, it should exercise extreme care to avoid an attempt "to apportion the traffic artificially and thereby eliminate normal, healthy competition contrary to the national transportation policy." *Fabrics from Georgia and North Carolina to Okla. and Texas*, 63 M.C.C. 430, 434 (1955). By its reports and order in this proceeding, the Commission has properly recognized the right of the defendant freight forwarders to make available to the

shipping public reduced rates to meet motor carrier competition on volume shipments, such reduced rates having been made possible through the use by the forwarders of the economical Plan III rates and transportation service instituted by the rail carriers in 1958, and the action of the Commission was in no way arbitrary or capricious.

The Commission's order of September 4, 1959 was issued after full and fair hearing, is within the scope of the statutory jurisdiction and authority of the Commission, is supported by adequate findings based upon substantial evidence, has a rational basis, and is in all respects in accordance with law.

The injunction prayed for by the plaintiffs should be denied and the complaint should be dismissed.

It Is Therefore Hereby Ordered that an appropriate final judgment in accordance herewith be entered.

Dated at Indianapolis, Indiana, this 5th day of September, 1961.

/s/ Latham Castle
Latham Castle
United States Circuit Judge

William E. Steckler
William E. Steckler
United States District Judge

Cale J. Holder
Cale J. Holder
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

No. TH 59-C-50

EASTERN EXPRESS, INC., ET AL.

v.

UNITED STATES OF AMERICA, ET AL.

Judgment

This action having come on for hearing on June 8, 1961, before this duly constituted statutory three-judge court, and the court having this day filed its memorandum setting forth its findings and conclusions to the effect that the order of the Interstate Commerce Commission complained of is valid and lawful in all respects and that the complaint should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the injunction prayed for be and it is hereby denied and that the complaint be, and it is hereby, dismissed on the merits.

Dated at Indianapolis, Indiana, this 5th day of September, 1961.

/s/ LATHAM CASTLE
Latham Castle
United States Circuit Judge

WILLIAM E. STECKLER
William E. Steckler
United States District Judge

CALE J. HOLDER
Cale J. Holder
United States District Judge

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 6993[1]

FORWARDER VOLUME COMMODITY RATES BETWEEN CHICAGO AND NEW YORK

Decided September 4, 1959

Freight-forwarder volume commodity rates in connection with trailer-on-flatcar service found just and reasonable, and not otherwise unlawful. Proceedings discontinued.

Leonard Stelzer, James L. Givan, D. Robert Thomas, F. N. Melius, Jr., Harry C. Ames, Jerry Chambers, S. S. Eisen, Paul J. Coughlin, George H. Leonard, H. L. Rosenthal, Theodore R. Schneider, Edward J. Effert, Giles Morrow, and *Isadore Richman* for respondents.

Edgar Watkins, Roland Rice, Homer S. Carpenter, J. E. Haydon, Albert W. Stout, and *Thomas J. Hogan* for protestants.

Report of the Commission

BY THE COMMISSION:

These proceedings were heard on a consolidated record. An examiner's report was waived, and we have heard the parties in oral argument. Requested findings not dis-

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[1] Includes supplemental orders Nos. 1, 2, 3, 5, 6, and 7, but does not include the eighth supplemental order, in I. and S. Docket No. 6993, the schedules of which were the subject of a separate hearing and report. This report embraces also No. 32530, Forwarder Volume Commodity Rates Between Chicago and New York.

cussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on August 20, 1958, Clipper Carloading Company, a freight forwarder, hereinafter called Clipper, proposed to establish numerous volume commodity rates between Chicago, Ill., on the one hand, and, on the other, New York, N. Y., and points within the immediate vicinity thereof. Subsequently, other freight forwarders[2] proposed to establish similar rates on like traffic between the same points to become effective on the same and later dates. Upon protest of the National Motor Freight Traffic Association, Inc., the Regular Common Carriers Conference of the American Trucking Associations, the Eastern Central Motor Carriers Association, Inc., as well as of certain motor common carriers operating within official territory, the operation of the proposed schedules was suspended until March 20, 1959, and later. The suspension dates were not voluntarily extended, and certain of the schedules have become effective. Subsequent to the hearing, the respondents requested and were granted special permission to cancel the rates which were also under suspension in Investigation and Suspension Dockets Nos. 6958, 7023, 6979, and 7025. For convenience, the rates under investigation will be referred to as the proposed rates.

No. 32530 is an ancillary investigation instituted by our order of September 19, 1958, into the lawfulness of the volume rates established by International between Chicago and New York.

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[2] Universal Carloading & Distributing Company, Inc., International Forwarding Company, Inc., Republic Carloading & Distributing Company, Inc., National Carloading Corporation, Acme Fast Freight, Inc., Lifschultz Fast Freight, Springmeir Shipping Company, Inc., Pacific & Atlantic Shippers, Inc., Midland Forwarding Corporation; and Blue Ribbon Express, Inc., hereinafter called Universal, International, Republic, National, Acme, Lifschultz, Springmeir, Pacific & Atlantic, Midland, and Blue Ribbon, respectively, when reference is made thereto.

These proceedings raise the issues of whether: (1) freight forwarders may handle shipments of any size, and, if so, may they establish rates based upon minimum weights so as to attract volume shipments; (2) in the usual course of business, assembly, consolidation, break-bulk, and distribution service will be performed under the considered rates; (3) a highway trailer transported on a railroad flatcar under the proposed rates is an instrumentality of transportation and, if so, may a freight forwarder lawfully furnish it; and (4) the considered rates are intrinsically lawful.

In recent years the freight forwarders operating in official territory generally have maintained rates the same as those of the principal motor common carriers on shipments weighing less than 10,000 pounds. Although they have published rates on some commodities subject to weights exceeding 10,000 pounds on a lower basis than those applicable to smaller shipments, they generally have not done so because the spread between their rates and the rail carload rates was insufficient to permit the establishment of lower rates on a profitable basis.

In July 1958, some rail carriers established so-called plan III trailer-on-flatcar rates[3] between Chicago and the New York City area of $451.50. These plan III rates, which require the shipper to furnish the trailers and transport them to and from the rail loading and unloading ramps, provide for the transportation of not more than two trailers on one flatcar, empty or loaded with 70,000 pounds or less of freight, with no one article exceeding a specified percentage of the total weight of the shipment, usually 60 percent. If the weight of the lading exceeds 70,000 pounds, the excess weight would be subject to a rate of 64.5 cents per 100 pounds. After these rates were established, the respondents concluded that they could establish lower rates on volume shipments on a profitable basis.

[3] These rates are under investigation in another proceeding.

Accordingly, they published the proposed rates, subject to minima ranging from 10,000 to 30,000 pounds, on the same level as those maintained by the principal motor common carriers, with the avowed purpose of meeting motor-carrier competition.

The respondents contend that their right to establish so-called volume rates is implicit in their right to handle shipments of any size; that the proposed rates generally are reasonably compensatory and in some instances would yield a handsome profit; and that the public interest requires them to reflect in their rates any advantages in costs or services which may accrue from improvements or economies in the underlying transportation service.

Under the proposed rates the forwarders generally would pick up a shipment, either in a pick-up truck or in a trailer used in line-haul service, and bring it to their terminals where it would be held awaiting consolidation with a sufficient quantity of other shipments so as to constitute the necessary trailerloads. When two trailers were loaded they would be moved to the rail ramps, and the rail carriers would place them upon a flatcar. In certain instances a single shipment of one commodity may be loaded in one trailer, but this is said to be the exception rather than the rule. In September and October 1958, Universal loaded 12 trailers between Chicago and New York and 190 from Chicago to Los Angeles and San Francisco, Calif., where 1 or more of the trailers on each car contained a shipment weighing 10,000 pounds or more. Of these, 22 trailers contained single shipments. In any event, the respondents contend that the flatcar, not the trailer, is the unit of shipment so far as they are concerned, and that there always is consolidation or shipments on flatcars.

The respondents submitted a cost study, based on information supplied by seven forwarders, intended to show that the proposed rates are compensatory in that in practically all instances they are substantially above

out-of-pocket costs. Particular reference was made to a rate of 96 cents, minimum 30,000 pounds, on cleaning compounds from New York to Chicago, the lowest of the proposed rates which would yield $288 per shipment. Clipper's witness stated that its trailer rental averages $18 for a single movement, and its cost of jockeying the trailers between its terminals and the rail head is $10 at origin and at destination. These amounts when added to the line-haul cost of $225.75 per trailer produce a total of $263.75. In addition, however, Clipper would load additional freight in the trailer, and the total weight would more than compensate for additional cost of pickup and delivery service.

The protestants contend that the respondents are not free to adjust their rates for the purpose of attracting volume traffic. They point out that generally the freight-forwarder rates have heretofore applied on the smaller any-quantity shipments which would not qualify for movement in truckload lots. The freight forwarders are said to enjoy a service advantage over the railroads, in that the forwarders reserve the right to specify the routing for the consolidated lot of small shipments which, if they had been tendered to the railroads initially, the multitudinous specifications of routing would have prevented efficient consolidation with a deterioration in overall service. This service advantage resulting from the consolidation of small shipments is said to be attractive to shippers, but they urge that this does not exist in connection with volume shipments equal to truckload lots. They contend that although the consolidation of volume shipments with others may take place, it is not a necessity with the motor carriers and, insofar as the forwarders are concerned, a necessity only by reason of statutory provision. Thus, they state, a consolidation of truckload shipments by a forwarder would be nothing more than an artificial and superfluous operation done either to comply with the law or to take advantage of some aspect of the

tariffs of the underlying carrier. To permit the forwarders to do this in connection with traffic upon which it has published volume rates equivalent to the truckload rates, the protestants argue, would be to permit the forwarders to compete with those carriers without offering any service advantage of any kind.

The protestants also contend that the shipments which a freight forwarder accepts should be of a kind that requires it to perform bona fide and not perfunctory assembly, consolidation, break-bulk, and distribution services. It is stressed that if the proposed rates are permitted to become effective a fundamental change in the operation of the respondents may take place since, under the plan III rail rates, they will be able (1) to accord services from consignor to consignee in a single trailer without transfer of lading; (2) to break down some volume shipments and distribute them among several of the line-haul trailers for the purpose of taking the most advantage of the plan III rates; and (3) to permit the exclusive occupancy of a single trailer for the transportation of a shipment from pickup at origin to delivery at destination.

Although the protestants do not specifically contend that the proposed rates are noncompensatory, they urge that the cost study presented by the respondents is defective, and that the proposed rates constitute a destructive competitive practice. They state that because of the very nature of their operations, freight forwarders offer services between principal traffic centers at rates and charges less than those applicable from and to the smaller and less commercially important points; that if the forwarders are permitted to divert the heavy-moving and most desirable truckload and volume traffic between the principal traffic centers, the motor carriers will not be able to continue their services at comparable rates to the smaller points; that motor rate increases at the smaller cities would necessitate similar increases at the principal centers, thereby increasing the diversion at the latter points; and

that conceivably motor carriers would be ultimately relegated to service at the smaller points only and at rates substantially in excess of those which shippers at the large centers would have available by the forwarders, thereby causing disruption in the present commercial relationships between localities.

The protestants presented exhaustive summaries of testimony before the committees of Congress in 1940-41, prior to the enactment of legislation regulating freight forwarders under part IV of the act, and cited decisions of this Commission purporting to show that freight forwarders are limited to the handling of small shipments. The respondents likewise made reference to those proceedings, and to certain Commission divisions. These presentations do not establish that freight forwarders are restricted to the handling of small shipments only, nor does section 402(a) of the act limit the maximum weight of a shipment which may be handled by a forwarder. Section 402(a)(5) reads:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

The fact that the proposed rates are subject to minima ranging from 10,000 to 30,000 pounds does not automatically exclude the traffic from being handled by a freight forwarder. In *Prepared Flour from Los Angeles to Arizona*, 283 I.C.C. 92, division 2 found just and reasonable, and specifically authorized a freight forwarder to charge a rate competitive with motor carriers, subject to a 20,000-pound minimum. It was pointed out, at page 94, that "Rates with a minimum of 20,000-pounds are maintained by the respondent on at least 25 other commodities." In *Consolidation of Shipments by Freight Forwarders*, 256 I.C.C. 305, 312, the Commission discussed volume rates of freight forwarders subject to minimum weights of 3,000 to 14,000 pounds without questioning the right to maintain such rates. See also *Forwarder Volume Commodity Rates, Transcontinental*, 306 I.C.C. 535, and *Radios and Boots from the East to Texas*, 306 I.C.C. 615, where forwarder volume rates subject to minima ranging from 10,000 to 30,000 pounds were approved.

As noted, the rail tariffs provide for a single shipment of mixed freight not to exceed 70,000 pounds loaded into 2 trailers transported on a flatcar with a restriction that no one commodity may exceed a specified percentage of the total weight of the shipment. Therefore, to comply with the provisions of the tariffs, at least 2 different commodities must be loaded on each car. The respondents have shown generally that their operations would consist of picking up a shipment in equipment owned or operated by them, either the line-haul trailer or a regular pickup and delivery vehicle which transports the shipment to their terminal, to be consolidated with other shipments assembled in a similar manner, or by loading into the line-haul trailer containing a shipment, other freight picked up at a shipper's place of business en route between the forwarder's terminal and the railhead. The loading of the trailers with these different shipments prior to delivery to the line-haul carrier, including those occasional instances

where one of the trailers may be loaded with only one shipment from one consignor to one consignee, in our opinion, constitutes an assembly and consolidation of the shipments to be delivered to the carrier as one shipment.

The protestants raise the question as to whether a highway trailer transported on a railroad flatcar is an instrumentality of transportation and, if so, whether the forwarder may supply it. Section 418 of the act, insofar as pertinent here reads:

> It shall be unlawful, except in the performance within terminal areas of transfer, collection, or delivery services, for freight forwarders to employ or utilize the instrumentalities or services of any carriers other than common carriers by railroad, motor vehicle, or water, subject to this Act; * * *

The respondents urge that, although they have wheels attached, the trailers utilized in the operation conducted under the proposed rates are nothing more than containers or large boxes filled with freight at their assembly station and loaded onto the railroad flatcars for line-haul transportation to their break-bulk station. The protestants contend that the trailers are instrumentalities of transportation, that section 418 of the act prohibits the forwarders from employing or utilizing the instrumentalities of any carriers other than those specified therein; that section 402(a)(5), as amended in 1950, refers to forwarders as common carriers, and that, therefore, the forwarders being common carriers other than those subject to parts I, II, and III of the act may not furnish trailers.

In support of their position that trailers are instrumentalities of transportation, the protestants refer to *Allowances for Use of Trailers*, 296 I.C.C. 351 and 299 I.C.C. 513, the latter report on reconsideration by us. In the initial report therein, division 2 expressed the view that trailers furnished by shippers for use by the railroads

under so-called plan II trailer-on-flatcar rates[4] are analogous to a container utilized by the shipper which, when returned, is subject to individual rates. The finding was reversed by us on reconsideration, but it is noted that the proceeding related to so-called plan II rates and services rather than plan III. We pointed out that the view of division 2 seemed to overlook the fact that the rail carrier held itself out to furnish a complete door-to-door, trailer-on-flatcar service for which trailers were needed as a part of respondent's common-carrier equipment; and that a trailer need not be furnished by a shipper, but, under the respondent's tariff, it was a part of the equipment of carriage which the respondent held itself out to furnish, and for which it could make a reasonable allowance under section 15(13) of the act. Here, under the plan III rates, the shipper is required to furnish the trailers; there is no holding out by the rail lines to furnish them, and their rates apply on the empty as well as on the loaded trailers. In *Vehicle Container Rates in Southwest*, 196 I.C.C. 127, rates were proposed on loaded or empty trailers or semitrailers which were considered as containers or articles of commerce, since they were to be furnished by the shippers and charged for whether loaded or empty.

Aside from the question of whether trailers when loaded upon flatcars are instrumentalities or containers, there is no contention that the ordinary shipper may not furnish the trailers under plan III rates, and we think they likewise may be furnished by forwarders. In *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, we stated, at page 107, that in its relation with carriers by railroad, a freight forwarder is in many, perhaps most, respects a shipper, citing *Chicago, M., St. P. & P. R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 468. Moreover, it appears that the prohibition in section 418 against the use of instru-

[4] So-called plan II rates provide for the rail carriers to furnish the trailers and perform the pickup and delivery service.

mentalities or services of carriers, other than common carriers, was designed to prevent forwarders from using common carriers. In *Acme Fast Freight, Inc., Common Carrier Application*, 8 M.C.C. 211, 227, we expressed the view that freight forwarders could not lawfully ship by contract carriers, and in enacting section 418 Congress adopted this view.

We find that the proposed rates are just and reasonable and not otherwise unlawful. The proceedings will be discontinued.

COMMISSIONER MURPHY, concurring:

I agree with the ultimate findings and specifically with the conclusion that the trailers in issue are to be regarded as containers rather than as instrumentalities of transportation. For the reasons stated in my concurring expression in *Allowances for Use of Trailers*, 299 I.C.C. 513, I am of the opinion that the two reports are not distinguishable.

COMMISSIONER WALRATH, dissenting:

While I am not persuaded that the trailer is an instrumentality of transportation as urged by protestants, nevertheless I would find the volume rates here in issue to be unlawful on other basic grounds.

There can be little doubt that approval of respondents' proposals here will permit a new and previously unauthorized method of competition for motor carriers without the safeguards of requiring proof of public convenience and necessity. The effect may be likened to the Commission suddenly granting certificates to additional carriers from volume shipper origins to the principal city (railhead) destinations of the Nation. I find it difficult to believe this was contemplated or authorized by the Congress in promulgating Part IV of the act, or by the Commission in its case-by-case determination cited in this report.

While conceding that very persuasive arguments have been advanced by the respondents for the approval of these volume rate proposals, I am nevertheless constrained to feel that the forwarders' right to handle shipments of any size is inherently restricted to doing so at rate proposals based upon costs of consolidating and delivering less-than-truckload or less-than-carload shipments, as the case may be. The origin of "forwarding" as a form of carriage (as early as 1840) was based upon the concept of serving the small shipper, offering him a saving through consolidating his less-than-unit cargo with cargo of others similarly handicapped by low volume in order to make up a minimum weight, and thus to take advantage of a common carrier offering of carload or truckload rate levels.

In this proceeding we are asked to agree in effect that since it takes *two* truckloads to make a carload, it then follows that the *pro forma* delivery of two such containers to the railhead and receiving them separately at the end of the line haul constitutes "consolidation" in the first instance, and "break-bulk and delivery" in the second instance, within the meaning of the forwarders recognized historical role in the national transportation picture. I find it difficult to follow this reasoning.

Advances in transportation technique and flexibility in routing of traffic to take advantage of the inherent advantages of each mode of transportation (in order to benefit the shipper) must always be encouraged, but when progress in methods of achieving such flexibility is seized upon by one form of carriage to alter the character of its normal functions without congressional sanction and to the detriment of another essential mode of public service without offering a service advantage to the shipper not already available, such a development in my opinion constitutes destructive competition. The motor carriers argue convincingly that these new proposals will affect their volume points only, thus doing the greatest possible damage to their ability to render service at all points,

especially the smaller ones. Unless the national transportation policy is to be overlooked here, the volume rates in issue should be found contrary to the public interest and unlawful principally because of the departure from the traditional service function of freight forwarders.

The various piggyback plans already offer to the shipper a flexible choice of piggyback methods, and within the natural capabilities of each mode of carriage to compete for participation therein we should not interfere. However, until Congress determines differently we should not ignore the national requirement for a balanced *system* of carriage, with each mode able to rely upon its own inherent advantages as its basic competitive assurance of survival.

CHAIRMAN TUGGLE and COMMISSIONERS ARPAIA and FREAS did not participate.

APPENDIX C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 4th day of September, A.D. 1959.

INVESTIGATION AND SUSPENSION DOCKET NO. 6993
(and Supplemental Orders Nos. 1 through 7)

FORWARDER VOLUME COMMODITY RATES BETWEEN
CHICAGO AND NEW YORK

No. 32530

FORWARDER VOLUME COMMODITY RATES BETWEEN
CHICAGO AND NEW YORK

It appearing, That by orders in I. and S. No. 6993, dated August 13, 1958, and later, the Commission entered upon an investigation concerning the lawfulness of the rates,

charges, regulations, and practices stated in certain schedules described in said orders, and suspended the operation of the schedules until March 19, 1959, and later, when certain of the schedules became effective;

It further appearing, That in No. 32530, by an order dated September 19, 1958, the Commission entered upon an investigation into and concerning the lawfulness of the volume commodity rates and charges, rules, and regulations contained in the schedules described in said order;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That these proceedings be, and they are hereby, discontinued.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 6993[1]

FORWARDER VOLUME COMMODITY RATES BETWEEN CHICAGO AND NEW YORK

Decided April 8, 1960

On reconsideration, findings in prior report, 308 I.C.C. 455, that freight-forwarder volume commodity rates in connection with trailer-on-flatcar service between Chicago, Ill., and the New York, N. Y., area are lawful, affirmed.

Appearances as shown in the prior report.

Report of the Commission on Reconsideration

BY THE COMMISSION:

In the prior report herein, 308 I.C.C. 455, decided September 4, 1959, we found that the volume commodity rates of freight forwarders between Chicago, Ill., and the New York, N. Y., area under investigation in these proceedings are just and reasonable and not otherwise unlawful, and discontinued the proceedings. Upon consideration of the record and on our own motion, the proceedings were reopened for reconsideration on the present record. The facts are set forth in the prior report and will be restated here only to the extent necessary for an understanding of the issues herein discussed.

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[1] Includes supplemental orders Nos. 1, 2, 3, 5, 6, and 7 in I. and S. Docket No. 6993, and also embraces No. 32530, Forwarder Volume Commodity Rates Between Chicago and New York.

After these proceedings had been reopened for reconsideration as above indicated, Eastern Express, Inc., the National Motor Freight Traffic Association, Inc., the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Eastern Central Motor Carriers Association, Inc., filed a petition wherein we are asked to answer certain questions set out therein. The contents of that petition have been given careful consideration, and to the extent that the questions propounded are important to the issues presented, the answers thereto will be found herein or in the prior report in these proceedings. The petition is denied in all other respects.

These proceedings concern proposals by certain freight forwarders to establish numerous volume commodity rates, subject to minima ranging from 10,000 to 30,000 pounds, between Chicago and the New York City area, on the same level as those maintained by the principal motor common carriers. Upon protest of certain motor common carrier associations, as well as of certain motor common carriers operating within official territory, the operation of the proposed schedules was suspended.[2] Prior to the publication of these rates, which became effective on March 20, 1959, and later dates, the forwarders generally maintained rates the same as those of the principal motor common carriers on shipments weighing less than 10,000 pounds. Although the forwarders did maintain some rates subject to weights exceeding 10,000 pounds on a lower basis than those applicable on smaller shipments, this was not true on commodities generally for the reason that the spread between their rates and the rail carload rates was insufficient to permit profitable operations.

In July 1958, some rail carriers established so-called plan III trailer-on-flatcar rates between Chicago and the

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[2] The schedules of International Forwarding Company, Inc., were not suspended, but were placed under investigation in No. 32530.

New York City area of $451.50. These plan III rates, which require the shipper to furnish the trailers and transport them to and from the rail loading and unloading ramps, provide for the transportation of not more than two trailers on one flatcar, empty or loaded with 70,000 pounds or less of freight, with no one article exceeding a specified percentage of the total weight of the shipment, usually 60 per cent. If the weight of the lading exceeds 70,000 pounds, the excess weight is subject to a rate of 64.5 cents per 100 pounds. After these rail rates were established, the forwarders, concluding that they could establish lower rates on volume shipments on a profitable basis, published the subject volume rates with the avowed purpose of meeting motor-carrier competition.

One of the contentions advanced by the protestants is that we should prohibit the forwarders from establishing rates designed to attract volume shipments. To do otherwise, they contend, would permit the forwarders to go outside of their normal sphere of assembling and consolidating small shipments, and would give rise to a destructive competitive practice contrary to the national transportation policy. With respect to the asserted destructive competitive practice, the protestants state that because of the nature of their operations, freight forwarders offer services between principal traffic centers at rates and charges less than those applicable from and to the smaller and commercially less important points; that if the forwarders are permitted to compete with the motor carriers for the heavy-loading and most desirable truckload and volume traffic between the principal traffic centers, they will be able to divert substantial amounts of this traffic and adversely affect the ability of the motor carriers to continue their services at comparable rates to the smaller points;[3] that any motor-carrier rate increases at the smaller

[3] The forwarders' rates are generally lower between their assembling and distribution points than to and from their so-called off-line points due to the nature of their operations. See *Eastern*

points would necessitate similar increases at the principal centers, thereby increasing the diversion at the latter points; and that conceivably the motor carriers would ultimately be relegated to service at the smaller points only and at rates substantially in excess of those which shippers at the larger centers would have available by the forwarders, thereby causing disruption of the present commercial relationships between localities.

The protestants recognize that the forwarders generally maintain lower rates on shipments weighing 5,000 pounds than on shipments of lesser weights, thereby giving effect to the lower cost of handling one large shipment as compared with several small shipments of the same aggregate weight. However, while the protestants do not object to this, they urge that no weight break other than at 5,000 pounds should be permitted, and insist that forwarder rates on shipments of 10,000 pounds or more should be no lower than forwarder rates on shipments weighing 5,000 pounds. We fail to perceive sound reason for this position. As we indicated in our prior report, there is nothing in the provisions of part IV of the Interstate Commerce Act or the legislative history of that part which establishes that freight forwarders are, or were intended to be, limited in the weight of shipments which they may handle or which prohibits forwarders from establishing rates subject to minima ranging from 10,000 to 30,000 pounds. If a forwarder can handle a heavier weighted shipment more economically than it can handle several small shipments of the same aggregate weight, it seems to us just and reasonable that the shipping public should receive the benefits flowing from that fact. In the absence of an applicable statutory limitation or prohibition, we see no justification for holding that freight forwarders may not lawfully pub-

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Central M. Carriers Assn., Inc., v. *ABC Freight*, 300 I.C.C. 733. The motor carriers generally maintain the same relative level of class rates to and from the large and small points, but the record does not show that this is true with respect to commodity rates.

lish lower rates on heavier weighted shipments based upon economies inherent in the lower cost to them of the underlying transportation service which they utilize.

The national transportation policy contemplates the fair and impartial regulation of all agencies of transportation so as to recognize and preserve the inherent advantages of each, promote adequate, efficient, and economical service, and encourage the establishment of reasonable rates without unfair or destructive competitive practices. Plainly, as we have stated repeatedly, this pronouncement does not mean that one transportation agency may be required to refrain from establishing rates which are reasonable and otherwise lawful in order to protect the traffic of a competing mode. E.g., *Cigarboxes from Newark, N. J., to Selma, Ala.*, 296 I.C.C. 68; *Various Commodities—Mid-Atlantic and New England*, 63 M.C.C. 584; see *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282.

The rates under consideration are in no instance lower than the corresponding rates of the motor-carrier protestants. Thus, any advantage which one agency of transportation may have over the other is the result of differences in service. In addition to transporting their traffic over the highways, the motor carriers, like the forwarders, may, if they desire and the shippers do not object, have their trailers transported by rail in so-called substituted service at costs to them at least as low as those which would be enjoyed by the forwarders under the plan III rates of the railroads.

The record does not support the dire predictions of the protestants. For some time there has been competition from the forwarders for less-than-truckload traffic which the motor carriers have been able to meet and still prosper. The evidence of record does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to continue to survive and serve the public.

From all the evidence, we are satisfied that the considered rates are compensatory. Clearly, they are no lower than necessary to meet the existing competition. Under these circumstances, to refuse to permit the forwarders to maintain rates on the same level as those of the protestants would be tantamount to an attempt by us to apportion traffic artificially, and thereby to prevent normal, healthy competition and deny forwarders an opportunity to compete fairly with motor carriers, contrary to the national transportation policy.

The forwarders submitted evidence respecting their operations and the operations which they propose to engage in under the considered rates. After describing those operations in the prior report, we concluded as follows:

> The loading of the trailers with these different shipments prior to delivery to the line-haul carrier, including those occasional instances where one of the trailers may be loaded with only one shipment from one consignor to one consignee, in our opinion, constitutes an assembly and consolidation of the shipments to be delivered to the carrier as one shipment.

As we noted in the prior report, the protestants stressed that under the plan III rail rates, the forwarders will be able (1) to accord service from consignor to consignee in a single trailer without transfer of lading, (2) to break down some volume shipments and distribute them among several trailers for the purpose of taking the most advantage of the plan III rates, and (3) to permit the exclusive occupancy of a single trailer for the transportation of a shipment from pickup at origin to delivery at destination. However, none of the above provides a basis for holding the considered rates to be unlawful. They are not prohibited by part IV of the act. There are no restrictions as to the type of vehicle which may be utilized by the forwarders in pickup and delivery service, nor is there any

requirement that there be transfer of lading. Should considerations of operating efficiency and economy so dictate, there is no sound reason why forwarders may not use trailers in their pickup and delivery service, or why a forwarder may not have loaded on a flatcar for the line-haul movement the same trailer which is used in pickup service and, subsequently, use that trailer in the distribution operation. Similarly, there is no impropriety in forwarders redistributing volume shipments in order to utilize better the capacities of trailers, and thereby take full advantage of the rail rates.

Although there is no evidence that the forwarders have done so in the past, the protestants state that it is possible under the plan III rail rates for a flatcar to be loaded with two trailers each containing but a single shipment, and they contend that any alleged consolidation and distribution would be performed by the railroad and not the forwarders, since the plan III rates include the placing of the laden trailers on the flatcars at the origin of the line haul and the removal of the trailers at its termination. In our opinion, where a forwarder contracts for two or more shipments (including the case of two shipments each occupying a single trailer), tenders them at the railhead to be shipped as a single carload shipment, and makes, or arranges for, distribution of each of the tendered shipments to its consignee, there is consolidation and distribution by the forwarder despite the fact that the railroad which provides the underlying line-haul transportation physically places the trailers on the flatcar and removes them from the flatcar at the termination of the line haul. We conclude, upon the evidence, that under these rates, in the ordinary and usual course of their undertaking, the forwarders will perform the services of assembly, consolidation, and distribution as contemplated by section 402(a) of the act.

We have reviewed the other contentions of the protestants, which are fully set forth in the prior report and need

not be detailed here. Upon reconsideration, we adhere to the views which we expressed in the prior report, and the findings therein are affirmed.

COMMISSIONER FREAS, concurring:

I agree generally with the conclusions stated in the report and particularly with the ultimate finding that the proposed rates are lawful. No specific provisions of the laws we administer require or permit us to hold otherwise, nor can I find in the national transportation policy anything that condemns the proposal. It is not within the Commission's purview, by means of administrative action, to impose upon any operations limitations which the Congress has not embodied in the statutes.

Nevertheless, I am constrained to add that, in my opinion, from a broader economic and social point of view, rates such as those here before us are subject to serious question. There is in this country a definite trend toward decentralization of population and industry. It is likely that there are a multitude of factors which contribute to significant shifts in population and in economic activity. However, it seems plain that the very nature of the freight-forwarder service offered under the proposed rates would tend to encourage the further growth of larger and larger shipping centers. On the other hand, smaller and scattered communities to which such service is not provided, or at least not at equal rates, would be adversely affected. They would find it more difficult than ever to attract to themselves new industries that would be able to compete with, or even survive against, the larger communities.

I realize that these consequences affecting decentralization as such are matters over which we have no direct authority. They far transcend the problem of competition between carriers and involve broad questions of public policy which, if they need to be resolved, are matters for legislative action. It is for us, however, to call attention to their existence.

COMMISSIONER MURPHY, concurring:

I agree with the ultimate findings and specifically with the conclusion that the trailers in issue are to be regarded as containers rather than as instrumentalities of transportation. For the reasons stated in my concurring expression in *Allowances for Use of Trailers*, 299 I.C.C. 513, I am of the opinion that the two reports are not distinguishable.

COMMISSIONER WALRATH, dissenting:

In dissenting to the prior report, I said, in part:

> There can be little doubt that approval of respondents' proposals here will permit a new and previously unauthorized method of competition for motor carriers without the safeguards of requiring proof of public convenience and necessity. The effect may be likened to the Commission's suddenly granting certificates to additional carriers from volume shipper origins to the principal city (railhead) destinations of the Nation. I find it difficult to believe this was contemplated or authorized by the Congress in promulgating Part IV of the act, or by the Commission in its case-by-case determination cited in this report.
>
> While conceding that very persuasive arguments have been advanced by the respondents for the approval of these volume rate proposals, I am nevertheless constrained to feel that the forwarders' right to handle shipments of any size is inherently restricted to doing so at rate proposals based upon costs of consolidating and delivering less-than-truckload or less-than-carload shipments, as the case may be. The origin of "forwarding" as a form of carriage (as early as 1840) was based upon the concept of serving the small shipper, offering him a saving through consolidating his less-than-unit cargo with cargo of others similarly handicapped by low volume in order to make up a minimum weight, and thus to take advantage of a common carrier offering of carload or truckload rate levels.

In this proceeding we are asked to agree in effect that since it takes *two* truckloads to make a carload, it then follows that the *pro forma* delivery of two such containers to the railhead and receiving them separately at the end of the line haul constitutes "consolidation" in the first instance, and "break-bulk and delivery" in the second instance, within the meaning of the forwarders' recognized historical role in the national transportation picture. I find it difficult to follow this reasoning.

Advances in transportation technique and flexibility in routing of traffic to take advantage of the inherent advantages of each mode of transportation (in order to benefit the shipper) must always be encouraged, but when progress in methods of achieving such flexibility is seized upon by one form of carriage to alter the character of its normal functions without congressional sanction and to the detriment of another essential mode of public service without offering a service advantage to the shipper not already available, such a development in my opinion constitutes destructive competition. The motor carriers argue convincingly that these new proposals will affect their volume points only, thus doing the greatest possible damage to their ability to render service at all points, especially the smaller one. Unless the national transportation policy is to be overlooked here, the volume rates in issue should be found contrary to the public interest and unlawful principally because of the departure from the traditional service function of freight forwarders.

The various piggyback plans already offer to the shipper a flexible choice of piggyback methods, and within the natural capabilities of each mode of carriage to compete for participation therein we should not interfere. However, until Congress determines differently we should not ignore the national requirement for a balanced *system* of carriage, with each mode

able to rely upon its own inherent advantages as its basic competitive assurance of survival.

That language seems as applicable now as it was then, perhaps even more so in the light of several statements made in this report.

There is no question that the forwarder's service is valuable both to the shipper and the underlying carrier, and thus to the public. His ability to profit on the spread between less-than-unit rates and unit rates by efficient assembling, consolidating, breaking bulk, and distributing, at rates based on less-than-unit levels while paying the underlying carriers' unit rates, results in the equivalent of unit service for the shipper at less-than-unit rates and, for the carrier, an increased volume of unit freight. When all this is said, however, the forwarder remains adjunctive in the overall picture, and occupies no position warranting his exercise of unlimited carrier activity in the field of rates to the detriment of a basic mode of transportation and small localities generally.

As noted in this report, the forwarders maintain lower rates between their assembling and distribution (high-volume) points than those applicable to and from their "off-line" (low-volume) points. This is attributed to the nature of their operations. However, although there is no equivalent of section 4 in part II of the act, we have consistently held that the long-and-short-haul principle thereof is applicable to motor carriers and that motor-carrier charges higher at an intermediate point than at a more distant point are prima facie unjust and unreasonable. This is so despite the fact that motor carriers, for operating reasons, frequently move small shipments through their destinations to a terminal point for delivery on a backhaul peddler basis, which, in essence, is not different from the forwarders' distribution from key points. The duty of both the motor carriers and the forwarders is to serve all their authorized points, not merely their principal volume points, and to serve without unjust discrimination or undue or unreasonable preference or prejudice. The motor car-

riers justifiably fear their inability to meet this responsibility if substantial diversion to freight forwarders between volume points results from the rates here in question.

To say that the pronouncement of the national transportation policy "does not mean that one transportation agency may be required to refrain from establishing rates which are reasonable and otherwise lawful in order to protect the traffic of a competing mode," is a generally accurate statement of the law but it begs the question before us. Are the proposed rates "otherwise lawful," or do they go beyond the basic authority and purpose of freight forwarding? Certainly we would not uphold motor rates, even the best that could be devised, if the proponent carriers were without authority to perform the service for which such rates would be applicable.

I cannot agree that to require the forwarder, in the absence of a change in the basic law, to remain in his historical, and inherently proper, sphere of activity would amount to an attempt to "apportion traffic artifically" and to "deny[ing] forwarders an opportunity to compete fairly," in contravention of the national transportation policy. Rather, such requirement would appear necessary to the carrying out of the dictates of that policy. To do otherwise is to sanction the undercutting of the true carrier service of a basic mode of transportation and to leave the smaller localities and shippers dependent on the service of that mode at rates which, because of "forwarder competition" at volume points, would inevitably have to be higher than would otherwise be justified.

The basic concept and purpose of regulation under the Interstate Commerce Act is to eliminate, or at least minimize, discrimination, preference, and prejudice, whereas the instant proposal and decision seem to me not only to continue and countenance those evils but to lay the basis for their compounding.

COMMISSIONERS TUGGLE and HERRING did not participate.

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No. 623

In the Supreme Court of the United States

OCTOBER TERM, 1961

EASTERN EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

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v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 20a) which dismissed appellants' complaint seeking an injunction and a decree setting aside an order of the Interstate Commerce Commission. Appellants are a motor common carrier and three motor carrier associations (J.S. 1a–2a). The order of the Commission which they sought to enjoin authorized certain freight forward-

ers to offer rates for 10,000–30,000 pound minimum shipments at the same level as those offered by appellants for similar quantities (J.S. 12a, 39a).

In July 1958, certain railroads inaugurated a trailer-on-flatcar (TOFC or "piggyback") service which requires the shipper to furnish the trailers and transport them to and from the railroads' terminal loading ramps, between which they are transported by rail. Known as Plan III to distinguish the service from other TOFC arrangements,[1] these rail rates provide for the transportation of not more than two trailers on one flatcar, the trailers to be empty or loaded with not more than 70,000 pounds of freight, with no one commodity exceeding 60% of the total weight of the shipment. The Plan III rail rates have been approved by the Commission in an order which appellants, among others, are attacking in the United States District Court for the Western District of Missouri (*Cooper-Jarrett, Inc.* v. *United States,* No. 13469, pending) (J.S. 8–9).

Freight forwarders are regulated by the Interstate Commerce Commission under Part IV of the Interstate Commerce Act, 49 U.S.C. 1001 *et seq.*

[1] Plan I offers motor carriers the privilege of shipping their trailers, in substitution for highway movement, via railroad flatcar; Plan II service is offered directly to the shipping public, the railroads providing the motor transportation from the shipper's premises to the railroad terminal and from the railroad terminal at the other end of the movement to the receiver's premises, with the movement between the railroad terminals being accomplished on railroad flatcars; Plan IV is identical with Plan III, except that the shipper must also provide the flatcar.

Typically, they assemble and consolidate separate consignments of freight and ship them as a single unit via motor, rail or water to a destination at which they separate the individual consignments and distribute them to the respective consignees. Forwarders are in most respects shippers in relation to the line-haul common carriers whom they patronize. They pay normal rates but, by reason of the discount for volume shipments allowed in those carriers' tariffs, pay less than the total their customers would have to pay for separate shipments of the goods. By charging rates approximating those which the line-haul carriers would charge for separate shipments, the forwarders find their profit in the difference between those rates and the lower volume rates which they themselves pay.

By tariff schedules filed with the Commission to become effective on August 20, 1958, and later dates, certain freight forwarders published numerous commodity rates based upon weight minima of 10,000–30,000 pounds and which reflected the reduction in cost for line-haul transportation between New York and Chicago made available by the Plan III TOFC rail rates (J.S. 4a–5a, 22a, 24a). Upon the protest of appellants, who are also in a position to use TOFC service (J.S. 8, 39a) and whose rates were at the same level as those proposed by the forwarders (J.S. 8, 12a, 39a), the Commission suspended most of the new rates (J.S. 5a, 22a). Appellants charged that forwarders are required by Section 402(a)(5) of the Act, 49 U.S.C. 1002(a)(5), to operate by assembling and consolidating so-called small shipments for line-

haul as a single unit and by deconsolidating and distributing the separate consignments at destination, while under the proposed rates the forwarders were enabled unlawfully to accept full truckload, or volume, shipments and to provide for their transportation without performing those functions (J.S. 7a, 25a–27a, 37a–38a). They further charged that forwarders are barred by the Act from providing the trailers in which the goods are loaded and which are carried on flatcars from origin to destination (J.S. 7a, 29a). Finally, they charged that the proposed forwarder rates would divert traffic from the motor common carriers to an extent impairing their ability to provide adequate public service, and would thereby violate the National Transportation Policy, 54 Stat. 899, 49 U.S.C., preceding Section 1 (J.S. 7a–8a, 26a, 37a).

The rate suspensions expired on March 20, 1959, and later dates, and the proposed rates became effective (J.S. 5a, 22a). On September 4, 1959, after a full evidentiary hearing, the Commission issued its report and order finding the rates lawful and discontinued the proceedings (J.S. 21a–34a). It found that forwarders had long been allowed to offer volume rates, that there was nothing in the Act which limited the weight of a shipment which a forwarder may handle, and that such rates were not beyond the proper sphere of forwarder operations (J.S. 27a–28a); that under the proposed rates the forwarders would consolidate more than one shipment into each trailer except in occasional instances, and would tender two trailers to the railroads as a single ship-

ment in all cases (J.S. 28a–29a); and that the trailers supplied by the forwarders were containers or articles of commerce which the forwarders were not prohibited from supplying (J.S. 30a–31a).

Appellants filed their complaint in the district court on November 10, 1959. On February 15, 1960, the same day appellees filed their answer, the Commission *sua sponte* reopened the proceedings for reconsideration. At the Commission's request, the district court on March 1, 1960, stayed its proceedings pending further agency action. Appellants then filed with the Commission a petition which requested answers to a number of questions relating to their contentions. On April 8, 1960, the Commission issued its report on reconsideration (J.S. 35a–46a). It stated that answers to all questions in the petition which were important to the issues would be found either in its prior report or in the report on reconsideration (J.S. 36a). After reiterating its previous findings, it concluded further that the National Transportation Policy does not require rates to be maintained at an artificially high level in order to protect the traffic of a competing mode of transportation (J.S. 39a); that forwarder competition under the new rates would not seriously impair appellants' ability to serve the public (*ibid.*); that the new rates were compensatory, and no lower than necessary to meet appellants' competition (J.S. 40a); and that refusal to approve the rates would amount to an artificial apportionment of traffic to the detriment of healthy competition and in violation of the National Transportation Policy (*ibid.*). The Commission also specifically found the

evidence to show that the forwarders operating under these rates would in the ordinary and usual course of their undertaking perform the assembly, consolidation and distribution services contemplated by Section 402(a)(5) of the Act (J.S. 41a). The district court vacated its stay on May 31, 1960, and after briefing and argument, entered its final judgment dismissing the complaint on September 5, 1961.

The district court found that the evidence before the Commission clearly showed both the long existence of forwarder volume rates and the ability of motor carriers to survive in the face of forwarder competition for smaller shipments (J.S. 13a–14a); that the Commission had made adequate findings, supported by substantial evidence, to support its conclusions (J.S. 15a, 19a); that the Commission had properly approved the legality of forwarder volume rates and of forwarder supply of the trailers to be carried on flatcars by the railroads (J.S. 15a–16a); and that the Commission had properly applied the National Transportation Policy in upholding the rates at issue (J.S. 17a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. Appellants seek essentially to challenge the substantiality of evidence supporting the Commission's order and to dispute the wisdom with which the Commission resolved issues of transportation policy committed by Congress to the agency's discretion. Each branch of the attack has been thoroughly considered and properly rejected

by the court below, and there is no need for further review.

1. Appellants argue (J.S. 11, 16) that volume rates such as those upheld by the Commission and the district court are a novelty in the forwarder industry, and that they are inconsistent with the statutory functions assigned to forwarders by Part IV of the Interstate Commerce Act. But, like the Commission, the court below found this assertion to be in conflict with the evidence showing that forwarders have included numerous volume rates in their tariffs since shortly after the beginning of forwarder regulation in 1942 (J.S. 13a); that Congress was aware that forwarders were even then handling volume traffic when it enacted Part IV of the Act (J.S. 16a); and that in operating under these rates, forwarders would "in the ordinary and usual course of their undertaking" perform all the assembly, consolidation, break-bulk and distribution services required of them by Section 402(a)(5) of the Act (J.S. 16a). Similarly, the district court held (J.S. 14a) that the evidence fully supported the Commission's finding which rejected appellants' prediction of intolerable financial damage from the new forwarder rates. Indeed, appellants do not even attempt to challenge the Commission's findings that the rates are compensatory and no lower than necessary to meet appellants' competition—findings leading to the Commission's conclusion (approved by the court below, J.S. 17a) that to sustain appellants' contentions would be contrary to the National Transportation Policy. In short, the district court found the Commission's order to be

based upon substantial evidence and fully adequate findings, and this issue is not one which warrants further review. *Radio Corp. of America* v. *United States*, 341 U.S. 412, 420; cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–91.[3]

2. Despite the inferences which appellants would have this Court draw from their statements (J.S. 12, 16), the Commission has not unlawfully authorized forwarders to supply their own means of line-haul transportation. Section 418 of the Act, 49 U.S.C. 1018, prohibits the utilization by forwarders "except in the performance within terminal areas of transfer, collection, or delivery services" of "the instrumentalities or services of any carriers other than common carriers." But the rates which the Commission and the district court upheld merely allow forwarders who ship by rail common carriers to take advantage equally with other shippers of the railroads' Plan III TOFC service by supplying the containers to be loaded on the railroads' flatcars. See *Chicago, M., St. P. & P.R.R.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 468; cf. *Interstate Commerce Commission* v. *Delaware, L. & W.R.R.*, 220 U.S. 235, 251, 252–253. The Commission properly found (J.S. 30a) and the court below agreed (J.S. 11a–12a, 16a–17a) that where, as here, the railroads hold themselves out, not to furnish trailers, but to transport them, empty or loaded, at the rates in their Plan III tariffs, the trailers are to be re-

[3] While appellants complain (J.S. 7–8, 11) of the Commission's failure to make specific findings on each one of the questions contained in their petition after the proceeding was

garded as containers or articles of commerce; and the fact that the trailers are legitimately used by the forwarders for assembly and distribution within the terminal areas does not deprive the forwarders of their rights as shippers to supply them, least of all by reason of Section 418, which simply serves to prevent forwarders from shipping outside a terminal area by contract rather than common carrier. See S. Rep. No. 132, 77th Cong., 1st Sess., p. 7 (1941); H. Rep. No. 1172, 77th Cong., 1st Sess., pp. 17–18 (1941); Hearings before the Senate Interstate Commerce Committee on S. Res. 146, 76th Cong., 3d Sess., pp. 393–394 (1940); Hearings before the House Interstate and Foreign Commerce Committee on H.R. 3684, 77th Cong., 1st Sess., p. 259 (1941). Compare Section 410(h), 49 U.S.C. 1010(h).

3. Appellants cannot prevail in their attempt to overturn the Commission's evaluation, on the record before it, of the bearing of the National Transportation Policy on the rates in issue. There is no statutory impediment to the establishment of the forwarder rates. Since these rates are no lower than those of the motor carriers, competition will be in terms of service (J.S. 39a), with the public benefiting from the choice at equal rates of either transportation agency. In fact, it is the propriety and desirability in the public interest of making available to the public the services of different transportation agencies that

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reopened, it is clear that the Commission is required only to consider and discuss material issues, and that formal answers are not required, particularly on questions not material. Administrative Procedure Act, Section 8(b), 5 U.S.C. 1007(b); *Minn. & St. L. Ry.* v. *United States*, 361 U.S. 173, 192–194.

underlies this Court's decision in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83. Nor is there any question of encroachment upon any "inherent advantages" of appellants. First, this is in no sense a case of a higher-cost transportation agency undercutting the rates of a lower-cost agency; and, secondly, with competition at the same level of rates, there is no infringement of any inherent advantage of superior service which the motor carriers may possess. Indeed, there was no attempt by appellants to prove that any such inherent advantages even exist.

It is appellants' position, and not the Commission's order, which contravenes the National Transportation Policy. For the policy directs the Commission to foster "economical and efficient service," and cannot be deemed to require the forwarders to maintain rates at an artificially high level merely to protect the traffic of the motor carriers from fair and undestructive competition, thereby depriving the public of forwarder service at competitive rates. See 49 U.S.C. 15a(3). And, as previously noted, the Commission expressly concluded (J.S. 39a), "The evidence of record does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to continue to survive and serve the public," a conclusion which the district court found "amply justified" by the record (J.S. 17a). Moreover, the implementation of the National Transportation Policy is a matter uniquely for the Commission, and when, as the district court found to be the case here (J.S. 17a), the agency's findings are both rational and sup-

ported by substantial evidence, appellants may not complain that they would prefer the matter to be decided more to their own advantage. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87–88; *Schaffer Transportation Co.* v. *United States, supra*, 355 U.S. at 92.

CONCLUSION

Since this appeal presents no issue warranting plenary consideration, the judgment of the court below should be affirmed.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

EASTERN EXPRESS, INC., *et al.*,
Appellants

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,
Appellees

On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

MOTION OF APPELLEE FREIGHT FORWARDERS AND FREIGHT FORWARDERS INSTITUTE TO AFFIRM

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On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

MOTION OF APPELLEE FREIGHT FORWARDERS AND FREIGHT FORWARDERS INSTITUTE TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the appellee freight forwarders (whose published tariffs have been approved in this proceeding) and the appellee Freight Forwarders Institute move that the unanimous judgment of the three-judge District Court sought to be reviewed in this case be affirmed on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

The appellee freight forwarders[1] and Freight Forwarders Institute were parties to the proceeding before

1. ABC Freight Forwarding Corporation; Acme Fast Freight, Inc.; Blue Ribbon Express, Inc.; Clipper Carloading Company, Inc.; International Forwarding Company, Inc.; Sidney B. Lifschultz, Bernice Brown, Rose Grossman, Nora Bergman and American National Bank and Trust Co. of Chicago, Trustee, a partnership, d/b/a Lifschultz Fast Freight; Midland Forwarding Corporation; National Carloading Corporation; Pacific and Atlantic Shippers, Inc.; Republic Carloading & Distributing Company, Inc.; Springmeier Shipping Company, Inc.; Universal Carloading & Distributing Company, Inc.

the Interstate Commerce Commission and were defendants by intervention in the district court proceeding.

The opinion of the District Court is reproduced in the Appendix to the Jurisdictional Statement (herein called "J.S.") at pages 1a to 19a. The Report of the Commission and its Report on Reconsideration are reproduced in that Appendix at pages 21a to 33a and 35a to 46a.

STATEMENT IN SUPPORT OF MOTION

In this proceeding certain motor carriers have sought to compel their freight forwarder competitors to cancel rates which were filed with the Interstate Commerce Commission in 1958 for the transportation between Chicago and the New York City area of shipments having minimum weights from 10,000 to 30,000 pounds. The rates for these so-called volume shipments have been in effect since various dates in 1958 and 1959 (J. S., Appendix, p. 5a). In findings which are not contested, the Commission found, among other things, that "The rates under consideration are in no instance lower than the corresponding rates of the motor-carrier protestants" and that "the considered rates are compensatory" (J.S., Appendix, pp. 39a-40a).

In the operations under these rates, the forwarders collect the individual shipments of their customers and ship the consolidated carload shipment by rail to the terminal at the destination area under rail carload rate tariffs which are not in issue here. Describing those rail tariffs, the Commission stated:

> "As noted, the rail tariffs provide for a single shipment of mixed freight not to exceed 70,000 pounds loaded into 2 trailers transported on a flatcar with a restriction that no one commodity may exceed a specified percentage of the total weight of the shipment. Therefore, to comply with the provisions of the [rail] tariffs, at least 2 different commodities must be loaded on each car." (J.S., Appendix, p. 28a)

The rail rate paid by the forwarder for the line-haul transportation is a flat charge per car for any weight up to the 70,000-pound level (J.S., Appendix, p. 9a). At the destination area, the forwarder "makes, or arranges for, distribution of each of the tendered shipments to its consignee • • • " (J.S., Appendix, p. 11a). As is traditional in freight forwarder operations, the forwarder here combines smaller shipments into a consolidated carload shipment, enabling the line-haul transportation to be made at the carload rate.[1]

The Commission decided that the challenged rates of the freight forwarders "are just and reasonable and not otherwise unlawful" (J.S., Appendix, p. 31a). The District Court concluded its opinion as follows:

> "The Commission's order of September 4, 1959 was issued after full and fair hearing, is within the scope of the statutory jurisdiction and authority of the Commission, is supported by adequate findings based upon substantial evidence, has a rational basis, and is in all respects in accordance with law." (J.S., Appendix, p. 19a)

Contrary to appellants' assertions, no elements of novelty were presented by the challenged freight forwarder tariffs for these volume shipments. The appellants err in stating in the Jurisdictional Statement that "The avowed purpose of the forwarders was, for the first time, to become competitive with the motor carriers for such traffic" (J.S., p. 9) and that this was "an admittedly new type of freight forwarder operation" (J.S., p. 11). The facts are otherwise. The tariffs and the decision of the Interstate Commerce Commission were directly consistent both with previous forwarder tariffs and practices and with the numerous previous decisions of the Commission. Moreover, there is no conflict between the decision below and any decision of the Commission or of any court.

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1. The operations of the forwarders under the rates at issue thus are within the ordinary and usual service of forwarders as described in the cases cited by appellants (J.S., pp. 12-15).

Freight forwarders have been publishing various volume rates and competing for over-10,000-pound shipments ever since Part IV of the Interstate Commerce Act (regulating freight forwarders) went into effect in 1943 (J.S., Appendix, p. 13a). As the District Court noted:

> "Plaintiffs' statements to this court on brief that the forwarders had not heretofore published rates applicable to volume shipments is contrary not only to the findings of the Commission but also to the evidence of both parties at the hearing before the Commission." (J.S., Appendix, p. 13a)

The District Court, at page 13a, then described the evidence of record as to numerous *preexisting* volume rates of the freight forwarders (still in existence at the time when the rates at issue were published) for "shipments having minimum weights of 10,000 to 30,000 pounds between the points involved in this proceeding." The Court described a fourteen-page exhibit listing such preexisting volume rates between the points here involved and then referred to the evidence showing "that thousands of volume rates for transcontinental application have been published by the forwarders, and that the forwarders for many years have been handling large numbers of shipments under their transcontinental volume rates at the relatively high minimum weights." (J.S., Appendix, pp. 13a-14a)

There was also nothing new in the approval by the Commission of freight forwarder tariffs for volume shipments. The District Court cited numerous decisions of the Interstate Commerce Commission, over the many years since 1943, involving freight forwarder rates for shipments of minimum weights ranging from 10,000 pounds to 30,000 pounds and (where the line-haul transportation was by barge) for much larger weights. As the Court stated:

> "The decision of the Commission in this proceeding is consistent with its previous decisions. The Commis-

> sion in previous decisions has approved the publication by freight forwarders of rates for volume shipments at various minimum weights over 10,000 pounds." (J.S., Appendix, p. 17a)

Moreover, the use by freight forwarders of loaded trailers in making the line-haul shipments by rail, including such use in connection with volume shipments of the weights here involved, was not new. The Commission had previously approved this very use of trailers by the forwarders. The Court, citing the cases, stated that "Prior to the enactment in 1942 of Part IV of the Interstate Commerce Act, the Commission approved rail rates for the transportation of trailers of freight forwarders and other shippers and considered such trailers to be containers or articles of commerce." (J.S., Appendix, p. 18a) The Court further noted that in other decisions after the enactment of Part IV, and long prior to this proceeding, the Commission had "approved the use by freight forwarders of rail rates for the transportation of loaded trailers of the freight forwarders," including such use in connection with "rates of a freight forwarder at minimum weights up to 30,000 pounds, under which the freight forwarder shipped its loaded trailers by rail to the point from which delivery of the shipment was made direct to the consignee." (p. 18a) The operations here were of the same kind. Both the publication of rates for volume shipments and the use by forwarders of rail rates for shipment of loaded trailers were in accordance with previous practices and decisions.

The contention of the motor carriers that the competition by the forwarders would "jeopardize the ability of motor carriers to continue to provide transportation" and would "destroy the motor carriers" (J.S., p. 8) was fully considered by the Commission and, in the light of the evidence, was found to be without merit. As the Commission stated: "The record does not support the dire predictions of the

protestants." (J.S., Appendix, p. 39a) The findings by the Commission which the District Court approved included determinations, summarized by the Court,

> "that the evidence does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to survive and serve the public; that the forwarder rates are compensatory and are no lower than necessary to meet the existing competition; and that to refuse to permit the forwarders to maintain rates on the same level as those of the motor carriers would be tantamount to an attempt by the Commission to apportion traffic artificially and thereby to prevent normal, healthy competition and deny forwarders an opportunity to compete fairly with motor carriers, contrary to the national transportation policy." (J.S., Appendix, p. 12a)

The District Court noted that "The legislative history of Part IV of the Interstate Commerce Act shows that Congress was well aware that freight forwarders handled shipments weighing in excess of 10,000 pounds" and that "Congress refused to restrict competition," as the motor carriers had sought from Congress, with respect to competitive rates of freight forwarders. (p. 16a) Congress refused to adopt "proposed provisions of Part IV which, if adopted, would have made it unlawful for freight forwarders to publish rates lower than the contemporaneous rates of common carriers by railroad or motor vehicle for a like kind and quantity of property between the same points." (J.S., Appendix p. 16a) The forwarder rates here approved by the Commission, being on the same level as the motor carrier rates, thus are not even below the comparative level that the motor carriers themselves had asked Congress to establish as a floor for forwarder rates.

There is no basis for the contention of the motor carriers to the effect that what is done by the motor carriers is "for the public" but what is done by the forwarders, in provid-

ing transportation on rates no lower than those of the motor carriers, is "for their private benefit." (J.S., p. 17) Such a contention is in sharp contrast to the admonition by Congress to the Commission, in Part IV of the Act, to give due consideration, among other factors, "to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable freight forwarders, under honest, economical, and efficient management, to provide such service." (Section 406(d); 49 U.S.C. § 1006(d))

The District Court concluded, in part, as follows:

> "Nothing in that Act and [the national transportation] policy gives, or was intended to give, to the motor carriers a right to exclude freight forwarders from competition with motor carriers for shipments of 10,000 pounds or more; nor does that Act and policy provide that competition of freight forwarders for such shipments shall be restrained by requiring freight forwarders to charge the public more for such shipments than is charged by motor carriers, or by requiring freight forwarders to charge for such shipments rates no lower per hundred pounds than the rates for smaller shipments." (pp. 15a-16a)

The provisions of the Interstate Commerce Act which are said by the appellants to be pertinent to this proceeding are quoted at pages 3 to 6 of the Jurisdictional Statement. The Act contains no provision that freight forwarders may not handle or publish rates for the transportation of shipments in the 10,000 to 30,000-pound category and contains no provision that forwarders may not, like other shippers by rail, provide the boxes or containers, including trailers used as containers, in which the various commodities are held during the course of their rail transportation on the rail cars. For the reasons stated by the Commission and summarized by the Court at pages 11a and 12a, Section 418 of the Act (49 U.S.C. § 1018) has no application to the

operations of the forwarders under the rates at issue. As to appellants' comments that the freight forwarders operate trailers in "the terminal area of the city of origin" and "within the terminal area" of the city of destination to collect and deliver the shipments of their customers (J.S., 9-10), it will be noted that the Interstate Commerce Act expressly provides for such operations to be performed by freight forwarders "as transportation or service subject to part IV when performed by such freight forwarder: * * *" (Section 202(c)(1), 49 U.S.C. § 302(c)(1); see also Section 410(h), 49 U.S.C. § 1010(h); quoted at J.S., pp. 4-5). As the Commission stated in discussing Part IV of the Act:

> "There are no restrictions as to the type of vehicle which may be utilized by the forwarders in pickup and delivery service, nor is there any requirement that there be transfer of lading. Should considerations of operating efficiency and economy so dictate, there is no sound reason why forwarders may not use trailers in their pickup and delivery service, or why a forwarder may not have loaded on a flatcar for the line-haul movement the same trailer which is used in pickup service and, subsequently, use that trailer in the distribution operation." (J.S., Appendix, pp. 40a-41a)

In accordance with the provisions of Section 410(h), cited by appellants, the forwarders, in their operations under the rates at issue, do not "conduct any direct railroad * * * operations." Like other shippers of loaded trailers by rail under the rail Plan III TOFC rates, the forwarders tender their shipments to the railroads for the line-haul transportation between the terminal areas, and, like other shippers, the forwarders pay the rates published by the railroads for the performance by the railroads of that line-haul transportation. The "spread between the freight forwarder rates [to their customers] and the rail carload rates used by the forwarders for rail movement of consolidated forwarder shipments" (J.S., Appendix, p. 9a) provides the revenues from which the forwarders cover their other expenses and derive their profits. By the

consolidation of shipments which, individually, are far below the 70,000-pound weight provided for in the rail Plan III TOFC rates, the forwarders are able to obtain the carload rate under those rail tariffs. Even if these operations were unprecedented, which they are not, they would be entirely lawful.

At page 16 of the Jurisdictional Statement, appellants state:

> "Moreover, the Commission has also permitted the forwarders to compete for the first time on a broad and comprehensive scale with the physical carriers for volume and trailerload traffic as to which traffic the forwarder functions of consolidation and break-bulk are not performed."

The incorrectness of the first part of this sentence has been shown above; this was by no means the first time that the forwarders have competed for shipments of the 10,000 to 30,000-pound weights and, moreover, the competition of forwarders for shipments of these weights was known to Congress when it adopted Part IV, was not restricted by Congress, and has repeatedly been approved by the Commission. The last part of the quoted sentence, regarding performance of the forwarder functions, is contrary to the well-supported findings of the Commission which were approved by the District Court. After summarizing the Commission's findings describing the physical operations at the origin and destination areas, the Court stated:

> "The Commission concluded that in the ordinary and usual course of their business, the forwarders will perform the services contemplated by Section 402(a) of the Interstate Commerce Act, 49 U.S.C. Section 1002(a)." (J.S., Appendix, p. 11a)

Later in its opinion, the Court stated:

> "Under their operations described in the reports of the Commission in connection with the handling of shipments to which these freight forwarder rates apply, the freight forwarders, in the ordinary and

usual course of their undertaking, would perform all of the services contemplated by Section 402(a)(5) of the Interstate Commerce Act." (J.S., Appendix, p. 16a)

The Court's summary at pages 10a and 11a of the Commission's description of the physical operations of assembly and consolidation of the individual shipments into one carload shipment at the carload rate, and the breaking of the bulk of that consolidated shipment and the distribution of the individual shipments at destination shows plainly that these quoted findings and conclusions of the Commission and the Court were correct.

The well-reasoned opinion of the District Court and the reports of the Commission show that there is no significant or novel question presented by the appellants. The decision of the statutory three-judge court should be affirmed, on the ground that the questions on which the decision depends are so unsubstantial as not to need further argument.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 623

EASTERN EXPRESS, INC., THE EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO MOTIONS TO AFFIRM

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February 9, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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In its motion to affirm, the Government asserts that this case does not warrant plenary consideration by this Court because, it says, appellants seek only to challenge the substantiality of evidence before the Commission and to "dispute the wisdom with which the Commission resolved issues of transportation policy

committed by Congress to the agency's discretion." (P. 6 of Motion to Affirm). This is an inaccurate description of this appeal for the principal matter which appellants would bring before this Court is the failure of the Commission both to recognize and to resolve fundamental issues of transportation policy as required of it by Congress.

In their motion to affirm, the freight forwarders assert that the forwarder rates at issue are neither new nor apply for a novel service (P. 3 of Freight Forwarders' Motion to Affirm). Yet, the facts are that this Court has always recognized forwarders as specialists in the field of small-shipment transportation[1] and in this very case the Interstate Commerce Commission found and the court below agreed (J.S. 9a-10a, 23a-24a, 36a-37a), that the provision by freight forwarders of trailerload transportation performed in vehicles furnished by the forwarders is an entirely new operation made economically possible by the new Plan III and Plan IV TOFC services of the railroads. The foregoing leads necessarily to the conclusion that by the new operation forwarders would for the first time become competitive with motor carriers (and with railroads, for that matter) for general trailerload traffic. The lawfulness of this new competition is the basic issue which the Commission has neither recognized nor decided. The non-resolution of that issue is of critical significance because the paramount importance of this case is the public interest in an adequate system of public transportation at all points, large and small.

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[1] *United States* v. *Chicago Heights Trucking Company*, 310 U.S. 344 (1940), and *Chicago M. St. P. & Pac. R. Co.* v. *Acme Fast Freight*, 336 U.S. 465 (1949).

In *Eastern Central Motor Carriers Association* v. *United States*, 321 U.S. 194, 205-206 (1944), the Supreme Court, after commenting upon the obligation of the Commission during the time it was charged only with the regulation of the railroads, said the following:

> "But with the evolution of other forms of carriage, particularly motor carriage, and the commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the National Transportation Policy, as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage."

The Commission has failed to discharge the duty so plainly stated by this Court in the *Eastern Central* case. Freight forwarders are adjunctive carriers required by statute to function only through utilization of the line-haul services and instrumentalities of the physical and primary carriers. Yet, in spite of that fact, the Commission has approved the commencement by the forwarders of an entirely new type of opera-

tion without analyzing the competitive impact thereof upon the continuing capabilities of those physical carriers, the very operations of which give the forwarders life. As a consequence, the Commission has utterly failed to give consideration to the effect of the new forwarder service upon the national transportation system in which the public interest rests. This failure on the part of the Commission is the antithesis of the goal of regulation which requires the Commission to administer the Act "all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[2]

Demonstrative of the Commission's failure to treat of the foregoing fundamental consideration is the complete lack of any reference whatever to the National Transportation Policy in the Commission's first report (J.S. 21a-31a). A further demonstration is provided by the Commission's second report (J.S. 35a-42a) issued after the reopening of the proceeding on the Commission's own motion. The latter report dismissed, as unimportant to the issues, appellants' request for answers to the following questions:

> "Would not the aforesaid service by the forwarders be the substantial equivalent of the Plan II service of the railroads and the regular service of the motor carriers insofar as trailerload traffic is concerned?"
>
> "Would not the forwarder transportation of trailerloads generally conform to the pattern of

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[2] National Transportation Policy (49 U.S.C. preceding §§ 1, 301, 901, 1001).

> the forwarder transportation of small shipments in that it would be performed only between points of substantial traffic importance?"
>
> "Would not forwarder transportation of volume shipments between only principal points and the consequent diversion of such from motor carriers impair the ability of motor carriers to continue to provide transportation between both large and small communities at just and reasonable rates which avoid undue discriminations between localities, regions, territories, and descriptions of traffic?"

The nearest the Commission came to a discussion of the new forwarder service *vis a vis* the national transportation system is a statement in its second report as set forth at page 39a of the Jurisdictional Statement:

> "The record does not support the dire predictions of the protestants. For some time there has been competition from the forwarders for less-than-truckload traffic which the motor carriers have been able to meet and still prosper. The evidence of record does not permit a finding that the forwarder rates under consideration will produce a diversion in traffic sufficient to imperil the abilities of the motor carriers to continue to survive and serve the public."

The plain import of the foregoing statement by the Commission is that because the motor carriers have in the past competed with forwarders for less-than-truckload traffic without impairment of their service they will be able to compete in the future for trailerload traffic. The decision of the Commission, as approved by the court below with respect to the national transportation system rests upon nothing more substantial than a *non-sequitur*.

In its second report, written for the obvious purpose of boistering up the first, the Commission did refer to the National Transportation Policy, but those references themselves fall woefully short of measuring up to the Commission's duty of deciding the issues in conformity to the mandate of that Policy. This is manifest from the Commission's own characterization of the Policy (J.S. 39a):

> "* * * Plainly, as we have stated repeatedly, this pronouncement does not mean that one transportation agency may be required to refrain from establishing rates which are reasonable and otherwise lawful in order to protect the traffic of a competing mode. * * *"

Insofar as the case at bar is concerned, a more vacuous statement could hardly be imagined. The precise issue is whether the rates and thereby the new service are reasonable and otherwise lawful in terms of effect on the national transportation system and the corresponding public interest therein. We reiterate that this is a subject as to which the Commission said nothing in either report.

The Commission's only other reference to the National Transportation Policy also appears in its second report as follows (J.S. 40a):

> "From all the evidence, we are satisfied that the considered rates are compensatory. Clearly, they are no lower than necessary to meet the existing competition. Under these circumstances, to refuse to permit the forwarders to maintain rates on the same level as those of the protestants would be tantamount to an attempt by us to apportion traffic artificially, and thereby to prevent normal, healthy competition and deny forwarders an op-

> portunity to compete fairly with motor carriers, contrary to the national transportation policy."

This again is a meaningless statement insofar as the present controversy is concerned for it completely avoids the important and fundamental issues presented. It might have some relevance to the Commission's duty under the National Transportation Policy if it followed a determination of the basic issues of lawfulness of the new forwarder service in favor of that service, but the statement by no stretch of the imagination constitutes a resolution of those issues.

This appeal raises the issue of the lawfulness of a new type of operation by freight forwarders which have heretofore been regulated, both as to operating authorities and rates, as consolidators of freight to be moved in the line-haul service and by the facilities and instrumentalities of the physical carriers. In their traditional service, the service authorized by the Interstate Commerce Act, the forwarders offer to shippers of less-than-truckload quantities at points of principal traffic importance a service not directly available to such shippers from the physical carriers. By the new service, forwarders would become tantamount to physical carriers of trailerload shipments between points of principal traffic importance and would offer the public nothing that is not directly available from the physical carriers. There has been utterly no discussion, finding, or conclusion by the Commission as to the consistency of this new operation with the goal of regulation set forth above. Indeed, the two reports of the Commission and the decision of the court below consistently avoid rather than decide the fundamental issues presented by this case.

It is clear, therefore, that the issues before this Court are of tremendous importance in the regulation of transportation and that probable jurisdiction should be noted.

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